Supreme Court, U.S.
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114 (1)

No.

In The

SUPREME COURT OF THE UNITED STATES

JOSE R. CABRERA-FRATTINI, LANCE CORPORAL,
UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Appellant was accused of having sex with a 12 year old girl, but while the government had free access to talk to the alleged victim to prepare for trial, the defense was not given any opportunity to interview the alleged victim. The military judge ordered the alleged victim to submit to a pretrial deposition in order to remedy this unequal access to crucial evidence. Shortly before trial, the alleged victim was abruptly found unavailable to testify, and, over defense objection, a video of her deposition testimony was played for the jury. The question presented is:

Did the lower court err when it found that the deposition was a Constitutionally effective opportunity for cross-examination, where the deposition was the first and only opportunity for the defense to speak to the alleged victim, and the deposition had been specifically ordered to remedy the defense's inability to effectively prepare for trial?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Court of Appeals for the Armed Forces (CAAF) summarily affirmed the decision of the Navy-Marine Corps Court of Criminal Appeals (NMCCA) at *United States v. Cabrera-Frattini*, 2008 CAAF LEXIS 1086 (C.A.A.F. 2008). App. A, *infra*, at 1a. The principal opinion of the NMCCA is *United States v. Cabrera-Frattini*, 65 M.J. 950 (N.M.Ct.Crim.App. 2008). App. B, *infra* at 2a. The case had previously been remanded to the NMCCA by the CAAF after a successful government appeal at *United States v. Cabrera-Frattini*, 65 M.J. 241 (C.A.A.F. 2007). App. C, *infra*, at 20a. The original appellate opinion by the NMCCA is at *United States v. Cabrera-Frattini*, NMCCA No. 200201665, unpublished op. (N-M. Ct. Crim. App. August 2, 2006). App. D, *infra*, at 38a.

JURISDICTION

The Court of Appeals for the Armed Forces granted review of Petitioner's case and affirmed his conviction on October 1, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution is reproduced in App. E, *infra* at 93a.

STATEMENT

During a two month period in the Spring of 2001, T**** O***** ("TO"), a twelve year old girl, engaged in heavy drinking and multiple sex acts with several different partners, to include male Marines, while spending several nights at the home of Private First Class (PFC) Roy McNamara, USMC.[1] After TO's activities came to light, the Naval Criminal Investigative Service (NCIS) conducted an investigation, and received a statement from TO indicating that she had engaged in sex acts with PFC McNamara and with Lance Corporal (LCpl) Fredery Tapia, USMC, but with no mention of the Appellant.[2] PFC McNamara provided a statement indicating he had had sex with TO, and also that PFC Tapia and Appellant had sex with TO.[3] Appellant was subsequently placed in pretrial confinement, and charged with carnal knowledge and indecent acts for alleged sexual intercourse with TO.[4]

TO did not testify at the ensuing Article 32 hearing, nor were Appellant's trial defense counsels allowed to interview her; TO and her mother refused to make themselves available to the defense, and only spoke to the government counsel.[5] As a result, the defense counsel requested the convening authority to order a deposition of TO, a request which was denied.

After arraignment, defense counsel requested the

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[1] Appellate Exhibit ("AE") XXXV at 33;Record ("R") at 291,299
[2] AE XXXV at 13; (R. at 348).
[3] (R. at 302,303).
[4] Charge Sheet
[5] (R. at 33); AE II at 3.

military judge order a new Article 32 because, among other reasons, they had not been given an opportunity to speak to TO or have her subject to cross-examination.[6] A deposition was requested to both give the defense an opportunity to speak to TO in a controlled environment, and to acquire sworn testimony which could later be used at trial for impeachment.[7] The government counsel responded by arguing that he would try to make efforts to have TO available for interview, but that she would definitely be present for trial.[8]

The military judge denied the request for a new Article 32 hearing, but did order a deposition of TO, and ordered it to be considered by the convening authority.[9] In making his ruling, the military judge stated, "[T]he accused should not be denied the opportunity for cross-examination of a key Government witness under oath prior to trial."[10] TO was subsequently deposed on November 13, 2001 by government counsel and defense counsel, in the presence of appellant.[11]

On December 4, 2001, TO was admitted to Spirit of St. Louis Hospital due to her therapist's concern that her mental and emotional health had recently deteriorated.[12] She remained a patient there for 7 days, and was released on December 10, 2001. On December 11, 2001, a defense motion in limine to prevent the Government from offering TO's

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[6] (R. at 24.)
[7] (R. at 24,25,31.)
[8] (R. at 27,28.)
[9] (R. at 65.)
[10] *Id.* (emphasis added).
[11] AE XXXV.
[12] (R. at 174.)

deposition in lieu of her live testimony was litigated before the military judge.

The defense counsel stated that he had seen the deposition as an opportunity to finally interview TO, and a tool to prepare for her actual cross-examination at trial. He stated, "The defense's understanding what the purpose of [the deposition] was to interview [TO] . . . that's how my preparation was set up during the deposition . . . it was not the defense's goal to cross-examine her as if we were at trial."[13] Consequently, he argued, the deposition was deficient; as defense counsel had never been permitted to speak to TO prior to the deposition he could not prepare an actual cross-examination, and as he had been assured that TO would be at trial he omitted several questions and topics which would otherwise have been raised.[14]

Ultimately, TO's treating physician, Dr. Linda Bock, provided sworn testimony before the court which indicated that TO could not testify in court, as it would create excessive emotional distress. In discussing TO's prognosis, Dr. Bock indicated that, in general, "life stressors" tended to exacerbate the symptoms of bipolar disorder.[15] Dr. Bock also

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[13] (R. at 94).

[14] (R. at 94,95)("If I had the chance to interview her ahead of time and then we had a deposition, I would agree with the Government, because at the deposition I would have known what she was going to say. I would have known how to properly cross-examine her, and I would have had that evidence before me at my fingertips to present to her say, what about this? What about this inconsistent statement? What about this lapse in memory? What about this alcohol that you just identified? I couldn't do that because I don't have a crystal ball.").

[15] (R. at 177.)

related that TO indicated she did not want to testify at Appellant's court-martial:

> [TO] focused on [testifying] as though that was part of why she couldn't go on living. It would be better to be dead. I don't want to go back to court. I'm so tired of all this. [TO] was not willing to discuss the events. She had a very dictatorial, entitled, self-important attitude, attitude with a capital A. It was like don't bother me with this. I have got a life to live. I don't want to be doing depositions.[16]

Dr. Bock concluded her direct examination by stating that TO testifying at trial would "[N]ot be good for her. It would be bad for her."[17] On cross-examination, Dr. Bock acknowledged that her actual interaction with TO was limited to a total of one and a half (1½) hours over a five (5) day period. Dr. Bock acknowledged that after TO was allowed to return to school after she was released from the hospital, and she simply needed to receive follow-up treatment with a therapist.[18] Dr. Bock had no further contact with TO after her release from the hospital on 10 December, and had no actual knowledge of TO's then existing mental condition.[19]

Ultimately, Dr. Bock indicated that TO would not be able to healthily discuss the allegations against Appellant until she was "18-25 years old."[20] Dr. Bock made it clear that while it was physically possible for

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[16] (R. at 179.)
[17] (R. at 180.)
[18] (R. at 191.)
[19] (R. at 191,192.)
[20] (R. at 198,203.)

TO to testify in court, doing so would have no medical value as it would in no way be beneficial to TO's recovery.[21]

The military judge ruled that TO was unavailable, and denied the motion in limine, thereby permitting the Government to use the videotape of TO's deposition as substantive evidence before the jury.[22] The judge addressed 6th Amendment confrontation clause concerns, but, relying on *Ohio v Roberts*, ultimately found that the deposition contained an adequate cross-examination and had sufficient guarantees of reliability to be admitted as former testimony.[23]

After the deposition was ruled admissible, defense counsel asked the military judge if he could choose which of his cross-examination questions from the videotape he could have played before the members, stating, "If she was testifying I would get to choose what I asked her in cross and I may wish to do that as well in the videotape."[24] The military judge refused the request, stating that the cross-examination would have to be entered in its entirety or not at all.[25] In light of this ruling, the defense elected to not play the cross-examination at trial.[26]

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[21] (R. at 193,202.)

[22] (R. at 230.)

[23] (R. at 230,231)("When balanced against the deprivation of confrontation right, the interests of public policy and necessities of this case warrant dispensing with a confrontation at this trial."); *See also Ohio v Roberts*, 448 U.S. 56 (1980).

[24] (R. at 239.)

[25] *Id.*

[26] (R. at 288).

REASON FOR GRANTING THE PETITION

The Lower Court Has Decided an Unsettled Question of Federal Constitutional Law; Whether a Deposition Was a Constitutionally Effective Opportunity for Cross-Examination, Where the Deposition was the First and Only Opportunity for the Defense to Speak to the Alleged Victim, and the Deposition had Been Specifically Ordered to Remedy the Defense's Inability to Effectively Prepare for Trial.

Under *Crawford v Washington*, after it is first established that evidence is testimonial hearsay and the declarant is unavailable, the second requirement for admissibility is that there must have been an adequate opportunity for cross-examination. In overruling *Ohio v Roberts*, *Crawford* emphasizes that cross-examination under the Confrontation Clause is a *procedural* right, not a substantive right.[27]

Thus, the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[28] Additionally, *California v Green* clarifies that under the Confrontation Clause there must have been an opportunity for "full and effective cross-examination."[29] Notably, *Delaware v Fensterer* admonishes that "Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever

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[27] *See Crawford v Washington*, 541 U.S. 36,61 (2004)

[28] *Id.*

[29] 399 U.S. at 158.

extent, the defense might wish."[30]

Similarly, *Ohio v Roberts* indicates that an opportunity for cross-examination at a preliminary hearing would be sufficient to satisfy the Confrontation Clause.[31] Notwithstanding this language from *Fensterer* and *Roberts*, this Court has still acknowledged that there are guidelines which must be followed for assessing whether there was a "full and fair opportunity" for cross-examination, guidelines which must now be refocused in light of *Crawford*'s new emphasis on confrontation as a procedural right. Specifically, *Mancusi v Stubbs* found that cross-examination by a defense lawyer who had only been appointed four-days previously was *per se* deficient, and not a full and fair opportunity for cross-examination; the procedural posture of the case was itself invalid to satisfy the Sixth Amendment.[32]

A similar precedent was established by the Court of Military Appeals in *United States v Conner*, where the court contemplated a due process challenge to the use at trial of an unavailable witness's Article 32 testimony. The court found that the opportunity for cross-examination would be decificent if "the defense requested information for use in cross-examining a witness at an Article 32 hearing, but the requested information was withheld by the Government and not made available to the defense."[33]

In the instant case, the Government had free access to speak to TO, but the defense was denied

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[30] *Delaware v Fensterer*, 474 U.S. 15, 20 (1985).

[31] *Ohio v Roberts*, 448 U.S. at 73.

[32] *See Mancusi v Stubbs*, 408 U.S. 204 (1972).

[33] *See United States v Conner*, 27 M.J. 378, 390 (C.M.A. 1989)

any opportunity to obtain an interview.[34] As a result, the defense requested the convening authority to order a deposition of TO. In the government counsel's endorsement to the convening authority, he recommended the deposition request be denied, stating, "[T]here is absolutely no evidence that [TO] will be unavailable for trial. In fact the parents of all three minors have stated to Government counsel that they will be present [at] trial."[35] In accordance with the trial counsel's recommendation, the convening authority denied the request.[36]

Rule for Courts-martial 701(e) provides that the defense will have equal access to interview witnesses prior to trial.[37] The Government's failure to ensure equal access was what prompted the military judge to order the deposition. Although the Article 32 would be reconsidered as part of the deposition, the defense was never informed that there was any possibility TO would become unavailable. To the contrary, the Government repeatedly assured the defense and the military judge that TO would be available for trial.[38] Thus, this deposition is unlike depositions which are specifically ordered in anticipation of witness unavailability.[39]

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[34] (R. at 33).
[35] AE XIV at 2.
[36] AE XIV at 1.
[37] RULE FOR COURTS-MARTIAL 701(e)("Each party shall have . . . equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.")
[38] (R. at 27,28); AE XIV at 2.
[39] *See, e.g., United States v Crockett*, 21 M.J. 423 (1986); *United States v Cokeley*, 22 M.J. 225 (C.M.A. 1986); *United States v Vanderweir*, 25 M.J. 263 (C.M.A. 1987).

Once the deposition was ordered, the defense counsels ceased their efforts to interview TO. As there would be a deposition there was no need to increase TO's stress by having her speak to defense more than once.[40] Hence, the deposition was the only time the defense had *any* contact with the *essential* Government witness, but they were never informed that it would be their *only* opportunity.

Procedurally, as a matter of due process as well as under R.C.M. 701(d), there can be no doubt that it would be improper for a defense counsel to be denied access to an essential Government witness until his opportunity for cross-examination at the actual court-martial. Indeed, if a defense counsel does not make any effort to interview relevant witnesses prior to a court-martial it is a strong basis for a claim of ineffective assistance of counsel.[41]

Yet, the instant case lacks the due process even of the above scenario, as at least under those circumstances the defense counsel would have known that he was conducting his ultimate cross-examination of the key Government witness. This was not true in the instant case, as the defense counsel was assured that TO would be at trial four weeks later, and believed he was only conducting

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[40] (R. at 24,28,31).

[41] *See United States v Fluellen*, 40 M.J. 96,98 (C.M.A. 1994)("Effective counsel will contact potential witnesses to determine the facts, not necessarily the facts admissible in evidence, but all the facts. This can be done by talking to all potential witnesses, counsel for any suspects where there might be an indication that rights were invoked, and by visiting the scene of the crime.")(citations omitted); *Harrison v Quarterman*, 496 F.3d 419, 426 (5th Cir. 2005)("If counsel does not speak to a witness, then counsel 'is ill-equipped to assess his credibility or persuasiveness as a witness.'")(citations omitted).

trial preparation.[42]

A cross-examination in which counsel has been denied a prior equal opportunity to interview the witness, and had no notice that his first contact with the witness was actually his only opportunity for cross-examination, should be considered little more than a shadow of the bedrock *procedural* guarantee contemplated by *Crawford*, and can not be considered sufficient to have satisfied Appellant's rights under the 6th Amendment.

The lower court erroneously excuses the procedural violations attendant to the cross-examination of TO, by counter-factually referring to the violations as "tactical decisions" by trial defense counsel.[43] Yet, the trial defense counsel directly stated on the record that the defense was misled and prejudiced by the actions of the government, and was therefore not able to conduct an actual cross-examination. Further, the factors cited by the lower court--that appellant faced the same charges at the deposition and had the same incentive for cross-examination--are irrelevant to any assessment of procedural fairness and whether Appellant was extended his due process right to confrontation.

Certainly, it must be acknowledged that there are procedural circumstances where even if an accused has the "same incentive" during cross-examination, the opportunity for cross-examination could still be found Constitutionally ineffective, such as where the government has withheld relevant evidence from the defense.

This Court should grant certiori to identify the

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[42] (R. at 94,95).

[43] 65 M.J. at 953, 954.

parameters of these circumstances, and should hold that where the government has denied the defense access to a key witness, then the presumptive first interview of that witness may not, by surprise, later operate as the only opportunity for cross-examination and still held to be Constitutionally effective.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

U.S. v. Jose R. CABRERA-FRATTINI.

No. 08-0524/MC.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

2008 CAAF LEXIS 1086

October 1, 2008, Decided NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: [*1]
CCA 200201665.
United States v. Cabrera-Frattini, 65 M.J. 950, 2008 CCA LEXIS 74 (N-M.C.C.A., 2008)

OPINION

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, it is ordered that said petition is hereby granted, and that the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Appendix B

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
J.F. FELTHAM, F.D. MITCHELL, D.E. O'TOOLE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JOSE R. CABRERA-FRATTINI
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 200201665
GENERAL COURT-MARTIAL

Sentence Adjudged: 25 January 2002.
Military Judge: Col Alvin Keller, USMC.
Convening Authority: Commanding General, Marine Corps Recruit Depot, Parris Island, S.C.
Staff Judge Advocate's Recommendation: Colonel M. Fisher, USMC.
For Appellant: LT Jennie Goldsmith, JAGC, USN; Capt Babu Kaza, USMC.
For Appellee: Maj Brian Keller, USMC.

28 February 2008

PUBLISHED OPINION OF THE COURT

O'TOOLE, Judge:

Officer and enlisted members, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of carnal knowledge and of committing an indecent act with a minor, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The members sentenced the appellant to confinement for three years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

After carefully considering the entire record of trial, the appellant's seven assignments of error,[1] the

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[1] The appellant's assigned errors are contained in Appellant's Brief of 7 March 2005 and Appellant's Supplemental Brief of 31 August 2007:

> I. The military judge erred to the substantial prejudice of appellant when he failed to dismiss the senior member after learning that [TO's] stepfather was one of his drill instructors.
>
> II. Appellant was denied his right to confrontation under the Sixth Amendment by the military judge's finding that the primary witness against him was unavailable and admitting her deposition during trial.

briefs and supplemental briefs of the appellant and of the Government, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c).

Procedural History of the Case

A predecessor panel of this court set aside the findings and sentence, holding that the trial judge erred in allowing a pre-trial deposition to be introduced into evidence in lieu of the personal appearance of the putative minor victim, "TO," thereby violating the appellant's Sixth Amendment Right to Confrontation. *United States v. Cabrera-Frattini*, No.200201665, 2006 CCA Lexis 218,

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III. The trial counsel improperly argued during presentencing that the members should place themselves in the position of the alleged victim.

IV. The trial counsel committed prosecutorial misconduct in that he commented on Appellant's decision not to testify by using the word "unrebutted" thirteen times.

V. Appellant's charges constitute an unreasonable multiplication of charges since they both describe the same act.

VI. Based on the cumulative effect of assignment of error I-IV, Appellant was denied a fair trial.

VII. Appellant was subjected to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article 55, UCMJ.

unpublished op. (N.M.Ct.Crim.App. 2 Aug 2006)(*Cabrera-Frattini I*). This court's decision was overturned by our superior court, which held that "[u]nder the particular facts of this case, we hold that the military judge did not abuse his discretion by concluding that the Government made good faith efforts to procure the witness's presence for trial, concluding that TO was unavailable, and admitting TO's videotaped deposition testimony." *United States v. Cabrera-Frattini*, 65 M.J. 241, 248 (C.A.A.F. 2007)(*Cabrera-Frattini II*).[2]

We also note that, during the pendency of the appeal in this case, the Supreme Court decided the case of *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* held that, in order to admit testimonial hearsay, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. On the basis of that decision, the appellant now seeks review asserting, *inter alia*, that the deposition process in this case did not provide him a constitutionally adequate prior opportunity for cross-examination. The previous decision of this court concluded otherwise.[3] However, that summary conclusion was not the product of a substantive consideration of the narrow issue now presented. Furthermore, even though "[t]his portion of the

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[2] Our predecessor panel, having granted relief on the second assigned error, did not have occasion to review the other assigned errors. We will do so.

[3] "There is no dispute that the deposition was properly ordered and conducted, and the appellant had ample and full opportunity to cross-examine TO, with a view toward the deposition's possible later use at trial." *Cabrera-Frattini I*, 2006 CCA Lexis 218, at 13.

decision was not appealed" (*Cabrera-Frattini II*, 65 M.J. at 243, n.2.), in view of the shifting of case law from 2001 to the present, we do not consider the narrow issue as having been waived. *Id.* at 245 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)(holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on review.").

We have, therefore, reviewed anew this assigned error and affirm our prior holding. The deposition was properly ordered and conducted, and the appellant had a full and fair opportunity to cross-examine TO.

Depositions and the Confrontation Clause

Background

The charges against the appellant arose from his alleged sexual involvement with a teenage minor, TO. TO did not testify at the Article 32, UCMJ, investigative hearing. Following referral of charges, the defense requested that the convening authority order a deposition of TO. The convening authority denied the request. At trial, the defense raised a motion for a new Article 32, UCMJ, investigation. The military judge found that the investigation had been conducted in substantial compliance with RULE FOR COURTS-MARTIAL 405, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), but he ordered an oral deposition of TO, so that the defense would have the opportunity to cross-examine the key Government witness prior to trial. That deposition

was conducted and videotaped on 13 November 2001. Present were the appellant's individual military counsel (IMC), assistant defense counsel, the accused, and trial counsel. After direct examination of TO by the trial counsel, the IMC conducted cross-examination. About a month later, TO was hospitalized and remained unavailable to testify at trial. A portion of the videotape was then admitted in lieu of her direct testimony, giving rise to the first assigned error. The IMC objected to playing the portion of the videotape containing his cross-examination of TO and that portion was not played.

Analysis: Purpose of Depositions in Criminal Cases

In military practice, the primary purpose of a deposition under R.C.M. 702(a) is to preserve testimony for future use at trial. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), App. 21, at A21-34 (citing *Hearings on H.R. 2498 Before a Subcomm. of the Comm. on Armed Services* 81st Cong. 1st Sess. 1064-1070 (1949)). The Analysis of R.C.M. 702(a) notes that federal courts have consistently construed the rule's counterpart, FEDERAL RULE OF CRIMINAL PROCEDURE 15(A), as a device used to preserve future testimony and not as a discovery vehicle. *United States v. Varbaro*, 597 F.Supp. 1173, 1181 (S.D.N.Y. 1984); *see United States v. Adcock*, 558 F.2d 397, 406 (8th Cir. 1977)(citing 8 J. Moore's Federal Practice P 15.01[3] at 15-8 (1976)). Military practice provides for somewhat more flexible use of depositions in circumstances unique to the military, such as

securing the sworn testimony of a witness prior to trial who was improperly found to be unavailable at an Article 32, UCMJ, investigation. *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976). Additionally, as in this case, a deposition may be ordered to allow the defense an opportunity to cross-examine an essential witness who was not available at the Article 32, UCMJ, investigation. *United States v. Chuculate*, 5 M.J. 143 (C.M.A. 1978). But, even under such circumstances, litigants are on notice that a deposition could be admitted at trial in the event the witness is determined to be unavailable. R.C.M. 702(a), Discussion. Despite this, the appellant here declined other available options, such as a telephone interview of TO, and specifically requested an oral deposition. On the basis of the clear state of the law regarding depositions in criminal cases, we reject any implication or assertion that the appellant was somehow misled by the circumstances, or by the order of the military judge, such that he did not understand the deposition of TO could be admitted at trial, if she were to become unavailable.

Analysis: "Effectiveness" of Cross-Examination

The Supreme Court has declined to assess the effectiveness of questioning when an appellant has been given an opportunity for cross-examination. *Ohio v. Roberts*, 448 U.S. 56, 73 (1980), overruled by *Crawford*, 541, U.S. at 36. The court held that "in all but extraordinary cases, no inquiry into 'effectiveness' is required. A holding that every case involving prior testimony requires such an inquiry would frustrate the principal objective of generally

validating the prior-testimony exception in the first place -- increasing certainty and consistency in the application of the Confrontation Clause." *Id. at* n.12.[4] More to the point, "'[t]he Confrontation Clause guarantees . . . [t]he *opportunity* for effective cross-examination, however [it] does not extend to cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *United States v. Longstreath*, 45 M.J. 366, 373-74 (C.A.A.F. 1996)(quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)(emphasis in original). The portions of the *Roberts* and *Fensterer* opinions, withholding inquiry into the effectiveness of prior cross-examination, were not disturbed by the subsequent holding in *Crawford*,[5] and we decline to abandon them. To do otherwise would result in there being no firm rule for courts and counsel to rely upon when evaluating the admissibility of prior testimony.

In this case, the appellant had access to TO's prior written statement, as well as the benefit of interviewing the other witnesses and participating in an Article 32, UCMJ, investigation. The decision

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[4] The Supreme Court cited *Mancusi v. Stubbs*, 408 U.S. 204 (1972), as an example of an extraordinary case. In that case, the court considered the adequacy of counsel's cross-examination in a prior hearing only after finding that the appellant's counsel was otherwise ineffective. *Id.* at 209.

[5] "Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59.

to decline a telephone interview of TO and request an oral deposition was an informed, tactical choice. During the deposition, the charges against the appellant were the same as those for which he was later tried, so the appellant had the same interest in cross-examination during the deposition as he had at trial. He was present with both of his defense counsel, the trial counsel, and the putative victim. The choice of questions posed during the deposition cross-examination involved a series of tactical decisions, made with notice that the deposition could be introduced into evidence if TO were found to be unavailable for trial.

We find that these circumstances presented an adequate opportunity to effectively cross-examine TO at the deposition and the appellant's IMC availed himself of that opportunity. In view of these facts, we find the videotape of TO's testimony bore sufficient "indicia of reliability" and afforded the trier of fact a satisfactory basis for evaluating the truth of the prior statement. *United States v. Hines*, 23 M.J. 125, 129-30 (C.M.A. 1986); *United States v. Vietor*, 10 M.J. 69, 73 (C.M.A. 1980)(Everett, C.J., concurring in the result). We hold, therefore, that the appellant was afforded a full and fair opportunity for effective cross-examination of TO and that admitting TO's deposition into evidence at trial did not violate the appellant's Sixth Amendment Right to Confrontation.[6]

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[6] The ruling in *Cabrerra-Fratini II* determined that TO was correctly found to have been unavailable to testify at trial.

Prosecutorial Misconduct

In his third and fourth assignments of error, the appellant argues that the trial counsel impermissibly commented on the appellant's failure to testify and later improperly asked the members to put themselves in the victim's position. The IMC, however, did not object at trial to either of these arguments. We, therefore, review for plain error. R.C.M. 919(c); *see United States v. Erikson,* 65 M.J. 221, 223 (C.A.A.F. 2007)(citing *United States v. Barrazamartinez*, 58 M.J. 173, 175 (C.A.A.F. 2003) and *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001)). To prevail under a plain error analysis, the appellant "must demonstrate that: '(1) there was error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *Id.* (quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000))(citing *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999)). In applying this "black letter" law, we are mindful that a prosecutorial comment must be examined in light of its context within the entire court-martial. *United States v. Carter,* 61 M.J. 30, 33 (C.A.A.F. 2005).

Regarding trial counsel's argument on findings, it is well- established that a trial counsel may not comment upon the fact that an accused did not testify in his own defense, either "directly, indirectly, or by innuendo[.]" *United States. v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990)(citing *Griffin v. California*, 380 U.S. 609 (1965)). "Furthermore, he is not permitted to comment on an accused's failure

to produce witnesses in his behalf." *Id.* (citing *United States v. Swoape*, 21 M.J. 414 (C.M.A. 1986)). "If such comments are made, the record must then be examined for prejudice to determine whether the error was harmless." *Id.* (citing *Chapman v. California*, 386 U.S. 18 (1967)).

Looking at the trial counsel's argument in the context of this case as a whole, it appears he was not commenting on the silence of the accused, or on his defense, but on the strength of the Government's case, each witness having testified in general conformity with the others. Nevertheless, the military judge perceived the potential for this argument to be improperly interpreted. To prevent any unintended inference, the trial judge *sua sponte* interrupted the trial counsel. He then took the unusual step of questioning the trial counsel in the presence of the members. He secured the trial counsel's assurance that his comments about the Government's witnesses being "unrebutted" were not comments on the accused's right to remain silent. The military judge then instructed the members that the appellant was under no obligation to testify. He thereafter included in his instructions on findings that the appellant is presumed to be innocent, that the burden of proof never shifts to him, and that he has a right to remain silent. Apparently, the IMC was satisfied with the military judge's actions and saw no need for any additional corrective instructions. We, too, are confident that the prompt action of the military judge clarified the purpose of the trial counsel's argument, reemphasized the appellant's right not to testify, and prevented any

prejudice. Based on these facts, we find no plain error and, to the extent the trial counsel's comments were improper, they were harmless beyond a reasonable doubt.

Moving to sentencing, "Golden Rule" arguments ask the court members to place themselves in the position of the victim or the victim's near relative. They are improper because they seek to inflame the members of the court. *United States v. Baer,* 53 M.J. 235, 237-38 (C.A.A.F. 2000). In this case, trial counsel's reference to the members' "kids" not being safe on base "with this guy [the appellant] around" was improper. However, this was but a single reference in a lengthy, six-page argument on sentence. The reference appears to have been the trial counsel's attempt to address the impact of the appellant's misconduct on society and the Marine Corps. In context, the improper argument does not overtly appeal to the emotions of the members in an inflammatory manner. Our finding is confirmed by the fact that the IMC raised no objection at trial. We conclude that, although trial counsel's argument was error, it was neither obvious in the context of his broader argument, nor did it materially prejudice the appellant's substantial rights. Plain error is, therefore, not demonstrated and the appellant is entitled to no relief.

Finally, with respect to the assertion that the trial counsel's arguments are prosecutorial misconduct, we note that prosecutorial misconduct is "action or inaction by a prosecutor in violation of

some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Rodriguez-Rivera,* 63 M.J. 372, 378 (C.A.A.F. 2006)(citations and internal quotation marks omitted). We find that the instances of argument cited by the appellant do not rise to the level of prosecutorial misconduct, either individually or cumulatively, and they merit no relief. *See United States v. Doctor*, 21 C.M.R. 252, 261 (C.M.A. 1956)("It is a little difficult for us to find misconduct which compels a reversal when it purportedly arises out of an argument which had so little impact on defense counsel that they sat silently by and failed to mention it . . . at the time of trial.").

Challenge of Members

After the findings were announced, the court recessed for a short period. During that recess, the senior member, Lieutenant Colonel (LtCol) F, saw Staff Sergeant (SSgt) R, a drill instructor in his battalion, and inquired why he was in the law center. SSgt R replied that he was interested in the sentencing of the case, but he did not elaborate. During the subsequent *voir dire* of LtCol F, he acknowledged that he had heard SSgt R's last name during the trial testimony and, given his unique last name, he thought that SSgt R might be TO's stepfather. LtCol F also said that, while he knew SSgt R's last name, he did not know his first name and did not know very much about him. He knew that SSgt R was a drill instructor in his battalion, but he did not have direct interaction with him

because, as battalion commander, LtCol F worked through company commanders and First Sergeants. When the military judge asked whether the knowledge that SSgt R was TO's stepfather would influence LtCol F's deliberations in any way, LtCol F said, "No." Record at 441. Thereafter, the appellant declined two opportunities to conduct his own *voir dire* of LtCol F regarding his relationship with SSgt R. Record at 441-43. The appellant then challenged LtCol F for cause under R.C.M. 912(f)(2)(B).[7] The military judge denied the challenge, finding that the senior member's *voir dire* responses were "clear, reassuring and unequivocal with regard to his impartiality." Record at 443. He also found that SSgt R was not a member of the LtCol's family, but a staff noncommissioned officer in the LtCol's battalion with whom he had no regular contact.

R.C.M. 912(f)(1)(N) requires removal for cause when "'the member should not sit in the interest of having the court-martial free from substantial doubt as to legality, fairness and impartiality.'" *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004)(quoting *United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003)). This rule encompasses both actual and implied bias. *Id.* A military judge's ruling on a challenge for cause is ordinarily reviewed for abuse of discretion. *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000)(citations omitted). The military judge is entitled to great deference when deciding whether actual bias exists, because it is a question of fact. *United States v. Napolitano*, 53

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[7] Following the pretrial *voir dire* of LtCol F, the appellant had not challenged him for any reason. Record at 271-72.

M.J. 162, 166 (C.A.A.F. 2000). He is given less deference when we review his "finding on implied bias because it is objectively 'viewed through the eyes of the public.'" *Id.* (quoting *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999)). The proper standard of review for implied bias is "less deferential than abuse of discretion but more deferential than de novo." *Strand*, 59 M.J. at 458 (citations and internal quotation marks omitted). "[I]mplied bias exists when, regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced [i.e. biased]." *Id.* at 459 (citations and internal quotation marks omitted); *accord, United States v. Townsend*, ___ M.J. ____, No. 07-0229 (C.A.A.F. Feb 5, 2008). In making a determination about implied bias, we consider the totality of the factual circumstances. *Id.*

Applying the above standards, we find no abuse of discretion by the military judge in finding no actual bias. He considered the professional nature and the limited contacts of the relationship between LtCol F and SSgt R, and found the senior member's responses to be "clear, reassuring and unequivocal" regarding his actual ability to remain impartial. The facts of record support the military judge's decision, particularly considering that we did not see and hear LtCol F.

We also agree with the military judge that there is no implied bias in the relationship of LtCol F and SSgt R. The facts show the two had no personal relationship. Indeed, LtCol F did not know the SSgt's first name and, prior to seeing him at the law

center, LtCol F did not know that SSgt R was TO's step-father. The relationship of LtCol F and SSgt R was limited to that of senior-subordinate, with indirect interaction via intermediates in a military chain of command. We do not believe that most people in the position of LtCol F, a field grade officer in command of a battalion, would be biased in favor of one among several staff sergeants in his command, such that he could not set aside this limited professional relationship and fulfill his oath as an impartial court-martial member.[8] Additionally, we do not believe that a member of the public, in possession of all the facts, would view the situation as unfair. *See Strand*, 59 M.J. at 460 (service by convening authority's son as president of court-martial did not raise a significant question of legality, fairness, or impartiality, to the public observer pursuant to the doctrine of implied bias). Absent actual or implied bias, this issue is without merit.

Cruel and Unusual Punishment

Prior to invoking judicial intervention for alleged violations of Article 55, UCMJ, or the Eighth Amendment, "a prisoner must seek administrative relief." *United States v. White*, 54 M.J. 469, 472

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[8] The R.C.M. 807 oath provides that a member will "faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trial by court-martial, the case of the accused now before this court." R.C.M. 807(b)(2), Discussion.

(C.A.A.F. 2001). Absent some unusual or egregious circumstance, this includes demonstrating that he has exhausted the prisoner-grievance system, including a petition for relief under Article 138, UCMJ. *Id.*

The record indicates that the appellant made several complaints to brig authorities regarding his confinement and the behavior of brig personnel. These include Article 1150, UCMJ, complaints to the Commanding Officer of Naval Consolidated Brig, Charleston, and a Request Mast to the Commanding General of Marine Corps Recruit Depot, Parris Island. The appellant's complaints were reviewed and addressed by brig officials and the Commanding General. Thereafter, the appellant did not make an Article 138, UCMJ, complaint for additional relief. We conclude that, if action taken by the various officials was not adequate, the requisite administrative exhaustion of remedies required to invoke our review has not occurred. Additionally, we are unable to find any "unusual or egregious" circumstance that would prompt our review despite a failure to exhaust administrative remedies. As a result, we find the issue is not ripe and we decline to review it.

Cumulative Error

Having found the other assertions of error to be without merit, they are insufficient to invoke the doctrine of cumulative error. *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999).

Unreasonable Multiplication of Charges

Finally, we considered the appellant's assertion that the charges of which he was found guilty constitute an unreasonable multiplication of charges. This claim is without merit. *United States v. Quiroz,* 55 M.J. 334 (C.A.A.F. 2001). We will not discuss it further. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

Conclusion

The findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Senior Judge FELTHAM and Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix C

UNITED STATES, Appellant v. Jose R. CABRERA-FRATTINI, Lance Corporal U.S. Marine Corps, Appellee

No. 07-5001

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

65 M.J. 241; 2007 CAAF LEXIS 819

February 5, 2007, Argued
June 22, 2007, Decided

RYAN, J., delivered the opinion of the Court, in which EFFRON, C.J., and BAKER, ERDMANN, and STUCKY, JJ., joined.

For Appellant: Major Brian K. Keller, USMC (argued); Commander P. C. LeBlanc, JAGC, USN, and Colonel R. F. Miller, USMC (on brief).

For Appellee: Captain S. Babu Kaza, USMC (argued).

Military Judges: A. W. Keller and T. A. Daley (arraignment).

Judge RYAN delivered the opinion of the Court.

In *Crawford v. Washington*, the Supreme Court held that "[t]estimonial statements of witnesses absent from trial" are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness]." *541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*. We are asked in this case to determine whether the military judge abused his discretion by finding a thirteen-year-old witness suffering from

bipolar disorder and post-traumatic stress syndrome unavailable for *Confrontation Clause* purposes based on the witness's medical records and the testimony of a board-certified child psychiatrist that testifying would be detrimental to the witness's mental and physical health, including possible suicide at both the time of trial and the foreseeable future. We hold that the military judge did not abuse his discretion by ruling that the witness was unavailable.

A general court-martial, composed of officer and enlisted members, convicted Appellee, contrary to his pleas, of carnal knowledge and committing an indecent act with a minor in violation of Articles 120 and 134, Uniform Code of Military Justice (UCMJ), *10 U.S.C. §§ 920, 934 (2000).* The sentence adjudged by the court-martial and approved by the convening authority included forfeiture of all pay and allowances, reduction to the lowest enlisted grade, confinement for three years, and a dishonorable discharge. The United States Navy-Marine Corps Court of Criminal Appeals set aside the findings and sentence, holding that the military judge erred by determining that the witness was unavailable and admitting her videotaped deposition, in violation of Appellee's *Sixth Amendment* right to confrontation. *United States v. Cabrera-Frattini, No. NMCCA 200201665, 2006 CCA LEXIS 218, at *1 (N-M. Ct. Crim. App. Aug. 2, 2006)*(unpublished). Chief Judge Rolph, in dissent, concluded that the military judge had not erred. *Id. 2006 CCA LEXIS 218 at *32-*68.*

Pursuant to Article 67(a)(2), UCMJ, *10 U.S.C. § 867(a)(2) (2000),* the Judge Advocate General of the Navy certified to this Court this issue:

WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRONEOUSLY HELD THAT THE MILITARY JUDGE ABUSED HIS DISCRETION BY FINDING THE 13-YEAR-OLD WITNESS UNAVAILABLE ON THE BASIS OF MENTAL ILLNESS OR INFIRMITY, AND THUS THAT THE MILITARY JUDGE HAD ERRONEOUSLY ADMITTED THE WITNESS'S VIDEOTAPED DEPOSITION.

A. Background

1. TO's deposition

The charges referred against Appellee arise from sexual intercourse he had with TO while another Marine anally sodomized her. TO, then a twelve-year-old girl, is unrelated to Appellee.

In October 2001, the military judge ordered the deposition of TO so that Appellee would not be denied the opportunity to cross-examine a key Government witness under oath prior to trial.[1]

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[1] TO had moved to another state, and was unavailable to Appellee's Article 32, UCMJ, *10 U.S.C. § 832 (2000)*, investigation. Appellee sought to depose TO so that he could cross-examine her to "ask her those hard questions and get them on the record." The military judge ordered the deposition, but denied Appellee's motion for a new *Article 32*, UCMJ, investigation. He found the existing investigation in substantial compliance [**4] with Rule for Courts Martial (R.C.M.) 405(a). The military judge instead ordered the *Article 32*, UCMJ, investigation reopened for the sole purpose of considering TO's deposition. After considering TO's deposition, the investigating officer again recommended a general court martial.

TO was deposed on November 13, 2001. The deposition was videotaped in accordance with R.C.M. 702(g)(3). TO gave her testimony under oath and in Appellee's presence. Appellee's military counsel conducted a full cross-examination of TO without limitation.[2] This post-referral deposition was taken in full contemplation of the charged offenses referred to general court-martial.

2. Prosecution subpoenas and attempts to obtain TO for trial

Trial was scheduled to begin on December 10, 2001. Trial counsel subpoenaed TO and her mother to appear, issued travel orders, and made arrangements for them to fly from St. Louis, Missouri, to Parris Island, South Carolina.

3. TO's hospitalization

Shortly after her deposition, TO attempted suicide. On December 4, 2001, she was admitted to a psychiatric hospital in St. Louis, Missouri, because she was a severe danger to herself. Upon admission, TO was preoccupied with suicidal thoughts.

Dr. Linda Bock, a psychiatrist who specializes in child and adolescent psychiatry, initiated in-patient psychiatric treatment of TO's "significant psychiatric problems."

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[2] The Navy Marine Corps Court of Criminal Appeals noted: "There is no dispute that the deposition was properly ordered and conducted, and that appellant had ample and full opportunity to cross-examine TO, with a view toward the deposition's possible later use at trial." *Cabrera-Frattini, 2006 CCA LEXIS 218, at *13.* This portion of the decision was not appealed.

4. TO's absence from trial

On December 7, trial counsel received a faxed letter from TO's treating physician, Dr. Bock, which informed trial counsel that TO was hospitalized for in-patient psychiatric evaluation and treatment in St. Louis, Missouri, because TO was a "severe danger to herself." The letter stated TO was having "significant psychiatric problems" and was being treated with medications, but having "medication adjustment reactions." It further stated she could not attend court before the end of December 2001 and that her date of discharge from the hospital was unknown.

5. The military judge's inquiry

On December 10, 2001, Appellee's counsel filed a motion in limine to exclude TO's videotaped deposition testimony. Several hearings on the motion were held at which the Government offered documentary evidence to explain TO's hospitalization and ongoing medical condition as the reason for her unavailability for trial.

The military judge required more. Consequently, pursuant to the military judge's order, the trial counsel produced Dr. Bock for an Article 39(a), UCMJ, *10 U.S.C. § 839(a) (2000)*, session on January 22, 2002. Dr. Bock appeared before the military judge to address TO's medical and psychiatric condition. Without objection, Dr. Bock established her credentials and expertise as a board-certified child psychiatrist and practicing psychiatric analyst with more than twenty years of experience.[3]

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[3] Dr. Bock's curriculum vitae reflected an internship

In addition to her curriculum vitae, Dr. Bock presented eighty-eight pages of TO's medical and psychiatric treatment records. In her sworn testimony, Dr. Bock reiterated the diagnosis she had previously documented in TO's medical records. She described bipolar disorder as a mood disorder that caused TO to suffer disturbed, erratic behavior. She explained that TO suffered from bipolar II disorder, rapid cycling and post-traumatic stress disorder, as defined by criteria set forth in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) (4th ed. 1994).

Dr. Bock testified that TO's mental condition deteriorated significantly after TO gave her deposition. As evidence, Dr. Bock cited TO's suicide attempt. Its gravity was magnified by the fact that it was her second attempt. In her sessions with Dr. Bock, TO focused on the issue of testifying at the trial as one of the reasons that she could not go on living, believing it would be better to be dead than to testify. TO's condition required Dr. Bock to administer antipsychotic and mood-stabilizer medications to treat her disorders. Dr. Bock and other practitioners treated TO in the hospital for almost a week. Dr. Bock discharged TO on December

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in pediatrics, a residency in psychiatry, and a fellowship in child and adolescent psychiatry. She served in numerous consulting and teaching positions relating to her profession, published extensively in her field, and was a member and/or director of multiple professional organizations related to the treatment of psychiatric disorders.

10, 2001.

Dr. Bock described TO's prognosis upon release from hospitalization as "guarded," noting that TO had "a serious chronic psychiatric disorder." She did not expect TO's mood to begin to show signs of stabilizing for at least six to twelve months due to her illness, as that was the time needed for the antipsychotic and mood-stabilizing drugs to have an appreciable effect. Dr. Bock expected a difficult recovery period with a possibility of re-hospitalization. Dr. Bock concluded that it would be detrimental for TO to testify as a witness based upon TO's demonstrated psychological abnormalities before and during hospitalization.

On cross-examination, Dr. Bock reiterated her medical conclusion that TO could not testify because it would aggravate TO's bipolar disorder. She testified that TO was on the verge of psychotic mania during her hospitalization. She stated that she had prescribed medications to get TO's stress levels down and that, while testifying out of the sight of the members might be less stressful, it still would detrimentally increase brain stimulation.

In response to the military judge's questions, Dr. Bock testified that TO's mental illness was ongoing and its treatment would be long-term and protracted. She [**9] told the military judge that testifying would be a major, over-stimulating event for TO, which could predictably result in a repeat suicide attempt or a repeat psychiatric hospitalization.

Dr. Bock further testified on both direct and cross-examination that TO would not be able to talk about

what happened to her until TO, who was then thirteen, was eighteen to twenty-five, and perhaps not even then.

At the time of this hearing, a month and a half had passed since Dr. Bock had seen TO. Dr. Bock addressed the current accuracy of her prognosis, stating there was no other data that would be pertinent to change her view.

6. The military judge's findings of fact

Based upon Dr. Bock's testimony and the medical record evidence, the military judge found that TO had two significant psychiatric illnesses: bipolar II disorder and post-traumatic stress disorder. He found that she was being treated with Seroquel, a brain protectant and antipsychotic, and Tegretol, a mood stabilizer. As a result, he found that it "would be detrimental to [TO]'s mental and physical health now and in the foreseeable future to testify at the court-martial or any hearing regarding the charges before the court . . . ." He [**10] concluded that "any court appearance would re-traumatize [TO] and would worsen her mental and physical health to include her possible suicide."

Moreover, he found that TO "had first-hand knowledge of the material facts in her deposition[,] . . . appreciated the moral duty to tell the truth[,] . . . was reluctant to testify against the accused[,] . . . [and] lacked a motive to fabricate having consensual sexual intercourse with the accused."

7. The military judge's conclusion of law

The military judge concluded TO was unavailable and admitted TO's videotaped deposition. The

military judge ruled that the prosecution had established the requirement of unavailability for purposes of both the *Sixth Amendment* and Military Rule of Evidence (M.R.E.) 804.[4] He concluded the government had made a reasonable and good-faith effort to obtain TO's presence.

Appellee's counsel did not introduce contradictory expert testimony, ask to perform his own psychiatric assessment of TO, or request a continuance.

Based on TO's videotaped deposition and the other evidence presented at trial, Appellee was convicted.

B. Discussion

The *Confrontation Clause of the Sixth Amendment* provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *U.S. Const. amend VI.* The Supreme Court recently decided that, before "testimonial" statements may be admitted, the *Confrontation Clause* requires that the accused have been afforded a prior opportunity to cross-examine the witness, and that the witness be unavailable. *Crawford, 541 U.S. at 53-54.*

The military judge decided this case prior to the Supreme Court's decision in *Crawford.* At that time, the admissibility of out-of-court statements under the *Confrontation Clause* was controlled by *Ohio v.*

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[4] As we respond only to the certified issue relating to unavailability, we will not address the other findings of the military judge related to the admissibility of the deposition.

Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). Crawford applies to criminal cases, such as this one, that are still pending on direct review. *See Griffith v. Kentucky, 479 U.S 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)* (holding "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on review"); *see also Whorton v. Bockting, 127 S. Ct. 1173, 1181, 167 L. Ed. 2d 1 (2007)* (declaring *Crawford* to be a new rule of law). *Crawford* did not purport to change the test of witness "unavailability." *Crawford, 541 U.S. at 53-54.*

1. Legal framework

It has been the rule in this Court for more than twenty years that a military judge's determination of a witness's unavailability (and the antecedent question of the government's good-faith efforts) is reviewed for abuse of discretion. *United States v. Cokeley, 22 M.J. 225, 229 (C.M.A. 1986).* "Findings of fact are affirmed unless they are clearly erroneous; conclusions of law are reviewed de novo." *United States v. Rader, 65 M.J. 30, 32 (C.A.A.F. 2007).* So long as the military judge understood and applied the correct law, and the factual findings are not clearly erroneous, neither the military judge's decision to admit evidence, nor his unavailability ruling, should be overturned. *United States v. McDonald, 59 M.J. 426, 430 (C.A.A.F. 2004)* (citations omitted).

In order for a witness to be "unavailable" for *Sixth Amendment* purposes, the government must first make a "good faith" effort to secure the witness's presence at trial. *Barber v. Page, 390 U.S. 719, 724-*

25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968). In *Roberts*, the Supreme Court held that the lengths to which the prosecution must go to produce a witness is determined under a reasonableness standard. *448 U.S. at 74.* "[E]valuation of reasonableness or good-faith effort 'requires us to consider all the circumstances rather than to apply a per se rule.'" *Cook v. McKune, 323 F.3d 825, 835 (10th Cir. 2003)* (quoting *Martinez v. Sullivan, 881 F.2d 921, 924 n.1 (10th Cir. 1989)). See also Cokeley, 22 M.J. at 229* (recognizing that "there is no bright-line rule which will fit every situation," and that the "judge must carefully weigh all facts and circumstances of the case, keeping in mind the preference for live testimony."). The test for unavailability focuses on "whether the witness is not present in court in spite of good-faith efforts by the Government to locate and present the witness." *Cokeley, 22 M.J. at 228.*

Courts are not without guidance in undertaking this fact- and circumstance-driven inquiry. This Court has addressed some factors that should be considered to determine unavailability, including "the importance of the testimony, the amount of delay necessary to obtain the in-court testimony, the trustworthiness of the alternative to live testimony, the nature and extent of earlier cross-examination, the prompt administration of justice, and any special circumstances militating for or against delay." *Id.* Where the absence of the witness results from illness, a court should also consider the nature of the illness and the probable duration of the illness. *See United States v. Faison, 679 F.2d 292, 297 (3d Cir. 1982).*

2. Analysis

"When reviewing a decision of a Court of Criminal Appeals on a military judge's ruling, 'we typically have pierced through that intermediate level' and examined the military judge's ruling, then decided whether the Court of Criminal Appeals was right or wrong in its examination of the military judge's ruling." *United States v. Shelton, 64 M.J. 32, 37 (C.A.A.F. 2006)* (quoting *United States v. Siroky, 44 M.J. 394, 399 (C.A.A.F. 1996))*. The sole issue before us is whether the lower court erred in reversing the military judge's ruling that TO was unavailable for purposes of the *Sixth Amendment*. We conclude that it did.

The military judge's ruling on the motion in limine identifies the appropriate framework for legal analysis for an unavailability determination and addresses the relevant *Cokeley* and *Faison* factors, in the context of undisputed factual findings.[5] Those factual findings are not clearly erroneous, and we accept them as the factual predicate for our decision.

The military judge's good faith/unavailability findings included the following: (a)the government subpoenaed TO and her mother, issued their travel orders and made arrangements to fly them to Parris Island; (b) TO's hospitalization prevented her from complying with the subpoena; (c) TO had two significant psychiatric illnesses -- bipolar II disorder and post-traumatic stress disorder; (d) TO was taking Seroquel, a brain protectant and

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[5] *Cokeley*, of course, was decided in the context of a military judge's denial of a defense request for a continuance. There was no such request in this case.

antipsychotic drug, and Tegretol, a mood stabilizer; (e) it "would be detrimental to TO's mental and physical health now *and in the foreseeable future* to testify at this court-martial or any hearing regarding the charges that were before the court"; and (f) "[a]ny court appearance would re-traumatize [TO] and would worsen her mental and physical health to include her possible suicide" (emphasis added).

In this case, the military judge did not abuse his discretion by concluding that the Government exercised good faith efforts under the circumstances to produce TO at trial and that she was, nonetheless, unavailable. As both the majority and dissent below recognize, "[t]here is ample precedent for finding a witness, even a critical one, unavailable where the act of testifying in court is determined to be detrimental to the witness's physical or mental well-being." *Cabrera-Frattini, 2006 CCA LEXIS 218, at *13-*14* (citing *United State v. Keithan, 751 F.2d 9, 12-13 (1st Cir. 1984)* (finding unavailability in case of an elderly witness whose infirmity prevented travel); *Howard v. Sigler, 454 F.2d 115, 120-21 (8th Cir. 1972)* (upholding unavailability determination where tuberculosis prevented travel, even though witness might recover some day)); *accord Cabrera-Frattini, 2006 CCA LEXIS 218, at *53* (Rolph, C.J., dissenting) (citing *United States v. Donaldson, 978 F.2d 381, 393 (7th Cir. 1992)* (affirming unavailability determination of pregnant female admitted to hospital on the eve of trial)); *see also Ecker v. Scott, 69 F.3d 69, 70-73 (5th Cir. 1995)* (finding unavailability where there was a fifty-percent chance the witness would still be unavailable after three to four weeks); *Conley v.*

*McKune, 2004 U.S. Dist LEXIS 26315, at *18-*19 (D. Kan. 2000)* (finding unavailability as a result of a witness's medical condition and not as a result of the prosecution's lack of reasonable diligence); *Warren v. United States, 436 A.2d 821, 827-28 (D.C. 1981)* (affirming a finding of unavailability where there was a high likelihood of temporary or permanent psychological injury). And this Court's precedent reaffirms that "[u]navailability is clear when the witness is not expected to improve." *Cokeley, 22 M.J. at 229.*

Expert testimony supported the military judge's finding that TO suffered from severe psychiatric illness that would make testifying at trial or any hearing "now and in the foreseeable future" detrimental to TO's mental and physical health.[6] Under the facts of this case, "detrimental" included the possible suicide of TO.

The military judge's analysis and rulings reflect that he understood that *Confrontation Clause* considerations are most consequential "when the testimony of a witness is critical to the prosecution's

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[6] We note that a continuance was not requested and, in any event, "is not necessary in every case where a witness is ill but may recover someday." *Cokeley, 22 M.J. at 229.* Given the testimony about the protracted nature of TO's psychiatric illness, the benefit of a continuance is speculative, at best. *See also United States v. Crockett, 21 M.J. 423, 427-28 (C.M.A. 1986)* (affirming finding of unavailability where videotaped deposed witnesses were in Florida and unwilling to travel to Germany for trial.)

case against the defendant." *United States v. Quinn, 901 F.2d 522, 529 (6th Cir. 1990)* (quoting *United States v. Lynch, 163 U.S. App. D.C. 6, 499 F.2d 1011, 1022 (D.C. Cir. 1974)).* Contrary to Appellee's assertion, the actions of the military judge in this case are dissimilar from those at issue in *Cokeley, 22 M.J. at 229* (finding military judge abused his discretion based on misapprehension of the applicable law and a failure to articulate the relevant factors on the record) and *Burns v. Clusen, 798 F.2d 931, 942 (7th Cir. 1986)* (concluding that the factual findings were not supported by the record). In this case, the military judge not only entered detailed findings of fact and conclusions of law, he also *required* the prosecution to carry its burden of demonstrating "unavailability" before the witness's out-of-court statement was admitted.[7] *See Roberts, 448 U.S. at 74-75; Cokeley, 22 M.J. at 229.*

The lower court held that the military judge erred by finding TO unavailable based solely on the evidence presented by the Government. The question that divided the lower court was whether the trial judge

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[7] We note that the military judge required, over the Government's objection, that Government counsel call Dr. Bock to testify in order to demonstrate unavailability. But for the military judge's insistence on this additional evidence, it is questionable that the Government would have met its burden of proof regarding the unavailability of a key Government witness by assuming it needed to put forward only the faxed letters initially offered.

took sufficient steps to determine that TO was unavailable for trial. The majority concluded that the military judge should have required more, such as an updated prognosis, an independent medical opinion from a court-appointed expert, a recent letter from TO or her mother, or explicit exploration of the alternative of remote testimony. There could be a case where the alternative steps proposed by the lower court might be warranted. But in this case, Dr. Bock established both that TO was suffering from a serious mental illness that would likely demand years of medication and therapy to control, and that the risk of suicide was ongoing and would be exacerbated by testifying in any forum in the foreseeable future.

While Dr. Bock's testimony was presented to the trial judge forty-four days after her examination, Dr. Bock addressed the current accuracy of her prognosis, stating there was no other data that would be pertinent to change her view. We agree with Chief Judge Rolph that Dr. Bock's diagnosis was not stale. *Cabrera-Frattini, 2006 CCA LEXIS 218, at *57-*59* (Rolph, C.J., dissenting).

The military judge found that it would cause TO harm "now and in the foreseeable future" to testify "at this court martial or any hearing regarding the charges before the court." In light of this finding, exploring the option of remote live testimony was not indicated.

The lower court did not hold that the military judge's findings of fact were clearly erroneous or unsupported by the record. And it did "not quibble with the qualifications of Dr. Bock's or her diagnosis

that TO was suffering from a serious mental illness in December 2001 that would likely demand years of medication and therapy to control." *Cabrera-Frattini, 2006 CCA LEXIS 218, at *22.* Rather, it noted that Dr. Bock's opinion was "based on considerable medical acumen and reliable statistics . . ." *Id. 2006 CCA LEXIS 218 at *23.*

Appellee has not identified precedent requiring a second medical opinion upon a trial court finding that a mental or physical illness could be exacerbated, with potentially life-threatening consequences, by a court appearance. Nor are we aware of a rule requiring courts to investigate independently the established medical condition of an unavailable witness, absent defendant's request for an examination. *See Alcala v. Woodford, 334 F.3d 862, 880-81 (9th Cir. 2003)* (holding courts have no duty to investigate, sua sponte, the medical condition of an alleged unavailable witness); *Warren, 436 A.2d at 830* (finding no responsibility on the part of court to request, sua sponte, an updated report of psychological health, relying instead on "a reasonable presumption of continuing mental condition").

We decline to hold that while non-amenability and refusal of a witness to voluntarily appear can establish constitutional unavailability, a life-threatening illness can not. *See Mancusi v. Stubbs, 408 U.S. 204, 212, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972)* (holding witness unavailable because state was powerless to compel witness's attendance at trial); *Crockett, 21 M.J. at 427-28* (reasoning that witnesses in Florida were unavailable because they could not be compelled against their will to testify in

Germany).

Under the particular facts of this case, we hold that the military judge did not abuse his discretion by concluding that the Government made good faith efforts to procure the witness's presence for trial, concluding that TO was unavailable, and admitting TO's videotaped deposition testimony.[8]

3. Decision

We answer the certified question in the affirmative. The decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to that court for further review in accordance with Article 66, UCMJ, *10 U.S.C. § 866 (2000)*.

Appendix C

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[8] Concluding that TO was unavailable under the *Confrontation Clause*, we also are satisfied that the military judge did not abuse his discretion in finding TO unavailable under M.R.E. 804(a)(4).

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

J.W. ROLPH D.A. WAGNER E.B. STONE

UNITED STATES

v.

Jose R. CABRERA-FRATTINI
Lance Corporal (E-3), U. S. Marine Corps

NMCCA 200201665 Decided 2 August 2006

Sentence adjudged 25 January 2002. Military Judge: A.W. Keller. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Recruit Depot, Parris Island, SC.

LT J.L. GOLDSMITH, JAGC, USNR, Appellate Defense Counsel
Capt BRIAN KELLER, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Senior Judge:

The appellant was convicted, contrary to his pleas, by officer and enlisted members sitting as a general court-martial, of carnal knowledge and committing an indecent act with a minor, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The members sentenced the appellant to a dishonorable discharge, forfeiture of all pay and allowances, reduction to pay grade E-1, and confinement for three years. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the appellant's seven assignments of error, the Government's answer, and the additional matters attached by the Government. We agree with the appellant's second assignment of error that the military judge erred in finding a key Government witness unavailable based on the facts presented by the Government and subsequently admitting the videotaped deposition of that witness in violation of the Confrontation Clause of the Sixth Amendment. Because of our resolution of this assignment of error in the appellant's favor, we need not address the remaining six assignments of error.

Background of the Case

The charges against the appellant arose from

his alleged sexual involvement with a minor, TO. TO did not testify at the Article 32, UCMJ, hearing. Following referral of charges, the defense requested that the convening authority order an oral deposition of TO in order to preserve her testimony at trial and because the defense had been unsuccessful in its attempts to interview her. The convening authority denied the request. In the initial stages of the trial, the defense raised a motion for a new Article 32, UCMJ, investigation and complained to the military judge that the defense team had been denied access to TO in preparing for trial, citing the denial of their request to orally depose her. The military judge found the Article 32, UCMJ, investigation to be in substantial compliance with RULE FOR COURTS-MARTIAL 405, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), but ordered an oral deposition of TO so that the defense would have the opportunity to cross examine the key Government witness prior to trial. The military judge also ordered the Article 32, UCMJ, investigation reopened for the limited purpose of considering the transcript of that deposition.

On 13 November 2001, a videotaped deposition of TO was conducted. During her description of the allegations during the deposition, TO testified that she was drinking and had problems remembering the events, but did recall telling the appellant her age, twelve years old, and recalled thereafter engaging in sexual intercourse with him, at times in the presence of others. TO was cross-examined by the trial defense counsel.

The appellant's trial was scheduled to begin on 10 December 2001. TO and her mother had been issued subpoenas and travel arrangements had been made. On 7 December, the Government was notified that TO had been hospitalized on 4 December and would not be available for trial before the end of the month. The Government thereafter raised a motion *in limine* to allow the introduction of the videotaped deposition of TO into evidence in lieu of producing her to testify at trial. The defense opposed the motion, citing the appellant's Sixth Amendment right to confrontation. The Government argued that TO was unavailable to testify due to mental illness or infirmity under MILITARY RULE OF EVIDENCE 804(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), and that the deposition should be admitted as former testimony under MIL. R. EVID. 804(b)(1) or, alternatively, under the residual hearsay exception, MIL. R. EVID. 807.

The evidence supporting the Government's position regarding unavailability consisted of the testimony of Dr. B, a civilian psychiatrist who described herself as the "tending physician" for TO during her hospitalization, and the hospital records from that period of hospitalization. Record at 174. At an Article 39(a), UCMJ, session held on 22 January 2002, Dr. B testified that she had first met TO on 5 December 2001, the day after TO had been admitted to the hospital. Dr. B testified that TO was admitted based on the recommendation of TO's outpatient therapist, who sensed a deterioration in her mental condition during sessions. Dr. B diagnosed TO as having bipolar-2 disorder (rapid

cycling), as well as post-traumatic stress disorder. Dr. B testified that both mental disorders were Axis I issues, classified as mental illnesses that can be effectively treated. Dr. B started TO on medication to treat her disorders.

Dr. B testified that persons with bipolar disorder have difficulty managing their moods and that "life stressors" make that even more difficult.[1] Record at 177. According to Dr. B's testimony, TO told her that she had she cut her hand trying to commit suicide in August 2001, but did not tell anyone. Dr B testified that her staff had taken a clinical history from TO's family that revealed a suicide gesture where TO put a plastic bag over her head, increased difficulty sleeping and concentrating, dropping school grades, fighting on the school bus, irritable behavior and racing moods and thoughts. Dr. B also testified that the antidepressants previously prescribed for TO were not the correct treatment for her disorder and may have exacerbated her symptoms.

When asked whether the issue of TO testifying was discussed, Dr. B replied that it had been, and stated that: "[TO] focused on that as though that was part of why she couldn't go on living. It would be better to be dead. I don't want to go back to court. I'm so tired of all of this." Record at 179. Dr. B testified that it appeared as though TO

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[1] Dr. B testified that it was the bipolar disorder alone that impacted on TO's ability to appear in court without harm to herself and that the post-traumatic stress disorder played no role in that determination.

felt that she did not want to be bothered with the trial and depositions and that, if she had "to go back there, I don't have a life." *Id.* Dr. B finished her direct testimony by stating that, in her opinion, it would be detrimental to TO for her to testify in court.

During cross-examination, Dr. B admitted that she had never seen TO before 5 December 2001 and that her review of TO's history had come from the hospital's assessment staff. Dr. B also stated that she had not reviewed TO's prior medical records or talked to her prior physicians. She further testified that TO was coherent, of average intelligence, and not suffering hallucinations. Additionally, Dr. B indicated that she had spent 30 minutes with TO on 5 December 2001 and about 15 minutes reviewing assessment records. Dr B. testified that she would have seen TO "for about 15-30 minutes" each weekday thereafter (6, 7, and 10 December were weekdays) and that a "substitute doctor" would have seen TO on the weekends. Record at 183. Dr. B also testified that she held staff meeting three times a week to share information with social workers, nurses, and therapists regarding the patients.

Dr. B testified that the hospital assessment staff had recorded in the hospital records TO's description of her involvement with the appellant as having been "gang-raped" by "four to six Marine officers." Record at 186. Dr. B also testified that the records indicated that TO had told her staff that she had, on more than one occasion, consumed alcohol

and engaged in consensual sexual encounters with a number of Marines. Dr. B also stated that she had never spoken with TO's mother, although her assessment staff had. Dr. B testified that TO was subject to other life stressors resulting from her family life, stating that TO had "a lot of them." Record at 190. Dr. B also recounted that TO was released from the hospital after five days, because she was no longer suicidal and her treatment could continue on an outpatient basis. Dr. B recommended that she begin treatment with a particular therapist and had not seen TO, or followed up on her in any way, since her discharge from the hospital.

Dr. B testified that, in her opinion, it would be possible, but doubtful, that TO's condition had improved dramatically since her discharge and that her treatment would be long-term in nature. Record at 192. She testified that, statistically, patients with such a disorder would not stabilize for 6 to 12 months. Dr. B specifically stated that nothing in her diagnosis would cause TO to be unable to testify in court. However, during the course of cross-examination, Dr. B stated: "I know she could come into court and do very poorly and that's why I am here on her behalf so that she does not come to court." Record at 202. Dr. B testified that she believed TO would be "about 18 to 25 years old before she will be in any way able to master this." Record at 198.

Dr. B testified that TO was suffering a "chronic psychiatric illness." Record at 203. She testified: "You can do a lot of things to make your bi-

polar disorder worse. In my opinion one of them would be for her to have a more stressful life with court. It is very stressful coming to court. I find it stressful."

Id. When asked about utilizing measures such as remote live testimony to reduce the stress on TO, Dr. B replied that she would still not recommend it. Dr B admitted that such a procedure would reduce the stress, but added, "Does it reduce the stress to the point that I think it is a value to my patient, no." *Id.* Dr. B emphasized that talking about the events, in her opinion, would be therapeutic for TO when she is 18 to 25 years of age.

Dr. B stated that, in her opinion, TO was suffering from an ongoing mental illness, that the treatment would be protracted, and that the harm from her testifying in court would be more than *de minimis*. She stated that "it would be a major, over-stimulating event that could be predictably associated with either a repeat suicide attempt or a repeat psychiatric hospitalization." Record at 208. Dr. B testified that TO receiving her subpoena to appear as a witness in court was a contributing factor in her hospitalization. In a 4 December 2001 entry into TO's record of treatment, Dr. B wrote, "Patient was only going to have to give depositions, however, now it appears she will have to attend the court proceedings." AE XLI at 10.

The military judge found "that it would be detrimental to [TO]'s mental and physical health now and in the foreseeable future to testify..." and

that "[a]ny court appearance would retraumatize [TO] and would worsen her mental and physical health to include her possible suicide." Record at 230-31. Having found her unavailable, the military judge went on to admit the videotaped deposition, both as former testimony and under the residual hearsay exception, finding that the right to confrontation was satisfied by the appellant's presence and trial defense counsel's participation in the deposition.

Admission of the Videotaped Deposition of the Witness

1. Standard of Review.

We review a military judge's decision to admit evidence over defense objection for an abuse of discretion. *United States v. Mason*, 59 M.J. 416, 420 (C.A.A.F. 2004)(citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). We will not overturn the military judge's ruling unless it was "'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)(quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)). We are required to consider the evidence in the light most favorable to the prevailing party. *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996). While we are bound by the military judge's findings of fact unless they are shown to be clearly erroneous, we review the military judge's conclusions of law *de novo*. *Mason*, 59 M.J. at 422 (citing *United States v. Cravens*, 56 M.J. 370, 375 (C.A.A.F. 2002) and

United States v. Allen, 53 M.J. 402, 408 (C.A.A.F. 2000)); *Ayala*, 43 M.J. at 298 (citing *United States v. Cardenas*, 9 F.3d 1139, 1147 (5th Cir. 1993) and *United States v. Mejia*, 953 F.2d 461, 464-65 (9th Cir. 1991)).

Our superior court has applied the foregoing standard of review to a military judge's determination of unavailability of a declarant. *United States v. Cokeley*, 22 M.J. 225, 229 (C.M.A. 1986)(citing *United States v. Faison*, 679 F.2d 292 (3d Cir. 1982)). The United States Courts of Appeal define this standard as giving "the presumption of correctness" to "basic, primary or historical facts," but reviewing de novo the issue of whether the standards established by the Constitution and the courts to determine unavailability have been met. *McCandless v. Vaughn*, 172 F.3d 255, 265 (3d Cir. 1999)(citing *Martinez v. Sullivan*, 881 F.2d 921, 926 (10th Cir. 1989); *Burns v. Clusen*, 798 F.2d 931, 941-42 (7th Cir. 1986); and *Dres v. Campoy*, 784 F.2d 996, 998 (9th Cir. 1986)).

2. Military Rules of Evidence.

The Military Rules of Evidence regarding hearsay statements, like their Federal counterpart, flow from the Sixth Amendment and generally prohibit the use of hearsay evidence. MIL. R. EVID. 802. The rules allow for the introduction of hearsay evidence under the conditions and exceptions enumerated in MIL. R. EVID. 803 and 804. Specifically, the rules permit the admission into evidence of former testimony in lieu of the personal

appearance of the witness if the witness is unavailable and the former testimony was given in:

> a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

MIL. R. EVID. 804(b)(1). MIL. R. EVID. 804(a)(4) defines "unavailability as a witness" to include a person who is unable to testify because of then-existing physical or mental illness or infirmity.

3. Right to Confrontation.

There is no dispute that the deposition was properly ordered and conducted, and the appellant had ample and full opportunity to cross-exam TO, with a view toward the deposition's possible later use at trial. The sole issue in contention is whether the evidence adduced during the Government's motion to admit the videotaped deposition was sufficient to show that TO was unavailable and, thus, sufficient to protect the appellant's right to confrontation.

There is ample precedent for finding a witness, even a critical one, unavailable where the act of testifying in court is determined to be detrimental to the witness' physical or mental well-being. For example, the infirmity of an elderly

witness that prevents the witness from traveling is an "exceptional circumstance" that can support the admission of deposition testimony at trial. *United States v. Keithan*, 751 F.2d 9 (1st Cir. 1984). Also, a witness unable to travel because of tuberculosis has been found to be unavailable, even though the witness may recover at some point in the future. *Howard v. Sigler*, 454 F.2d 115 (8th Cir. 1972).

The Supreme Court, however, characterizes the right to confrontation as a "bedrock procedural guarantee." *Crawford v. Washington*, 541 U.S. 36, 42 (2004). Historically in Anglo-Saxon law, the right to confront witnesses has been seen as a "face-to-face" in-court confrontation, combined with a meaningful opportunity to cross-examine the witness. *Id.* As the *Crawford* court observed, the common law that served as a starting point for the drafters of the Constitution conditioned admissibility of an absent witness's testimonial statement on unavailability and a prior opportunity to cross-examine. The Court went on to conclude that the Sixth Amendment, therefore, incorporated those limitations. *Id.* at 54. This is borne out by "numerous early state-court decisions" that made such an incorporation "abundantly clear." *Id.* The court therefore concluded that the confrontation clause demands "what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68.

In a case that preceded *Crawford*, the Court of Appeals for the Armed Forces stated:

> The confrontation clause of the sixth amendment requires the Government to demonstrate that the declarant is unavailable when it seeks to admit a deposition against an accused at a criminal trial in the place of live testimony.

Cokeley, 22 M.J. at 228 (citing *United States v. Inadi*, 475 U.S. 387 (1986); *Ohio v. Roberts*, 448 U.S. 56 (1980); *United States v. Crockett*, 21 M.J. 423 (C.M.A.1986)). The court described this test as being "whether the witness is not present in court in spite of good-faith efforts by the Government to locate and present the witness." *Id.*

The courts, generally, have expressed a strong preference, grounded in the Sixth Amendment, for live testimony at trial in a criminal case. "[T]rial by deposition violates both the literal language and the purpose of the Confrontation Clause...." *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993). In striking down a Kentucky procedure allowing depositions in lieu of live testimony they termed "easier and more efficient in terms of judicial and prosecutorial administration," the United States Court of Appeals for the Sixth Circuit stated that, while the procedure "may offer the same reliability that we require in civil cases," a "deposition is a weak substitute for live testimony, a substitute that the Sixth Amendment does not countenance on a routine basis." *Id.* That court went on to state that "[t]he Constitution does not allow us to so water down the explicit requirement of live testimony in

criminal cases." *Id.*

The military courts have adopted similarly strong language in addressing confrontation issues: "[I]n order for out-of-court statements to be admissible under the Confrontation Clause, it is preferable for face-to-face confrontation to occur at trial." *United States v. Hines*, 23 M.J. 125, 131 (C.M.A. 1986). In a case where our superior court upheld the admission of an excited utterance by a child victim, they again reinforced the stringent standards that guarantee the right of confrontation: "Let there be no doubt, however, that this Court favors confrontation, and this case should be read very narrowly." *United States v. Arnold*, 25 M.J. 129, 133 (C.M.A. 1987). *See also*, *United States v. Dill*, 24 M.J. 386, 387 (C.M.A. 1987)("We have emphasized that an accused ordinarily has a right under the Sixth Amendment to the Constitution 'to be confronted with the witnesses against him.'" *Hines* at 23 M.J. at 127).

The military courts have been equally clear in placing a heavy burden on the prosecution in making witnesses available for live testimony at trial: "[W]e have been quite insistent that the Government exhaust every means to secure the preferred live testimony before utilizing an out-of-court declaration." *Hines*, 23 M.J. at 133. Our superior court has termed this burden as "the prosecution's 'obligation . . . to exert all reasonable measures to acquire the presence of . . . [its] witnesses and tender them for cross-examination.'" *Dill*, 24 M.J. at 388 (quoting *Hines*, 23 M.J. at 133). This obligation is

firmly rooted in military jurisprudence: "[W]e have been quite insistent that all reasonable means of obtaining crucial witnesses' presence be undertaken before we will consider approving substitutes." *United States v. Barror*, 23 M.J. 370, 373 (C.M.A. 1987).

The Courts of Appeal have also uniformly held that the burden of proof of the unavailability of the witness on the party offering the deposition is a heavy one. The proponent must "make stringent efforts to show that a declarant is unavailable." *Burns*, 798 F.2d at 936-37 (citing *Barber v. Page*, 390 U.S. 719 (1968)). These efforts must be made in a good faith attempt to produce the witness. *Id.* The lengths to which the proponent must go to produce a witness is a question of reasonableness. *California v. Green*, 399 U.S. 149, 189 (1970). If there is a possibility, however, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. *Roberts*, 448 U.S. at 74.

The reasonableness of the prosecution's efforts "must be evaluated with a sensitivity to the surrounding circumstances and the defendant's interest in confronting the absent witness." *McCandless*, 172 F.3d at 266. More diligent efforts are required where the declarant is a critical witness, especially one whose interests are in unison with the prosecution. *Id. See United States v. Foster*, 300 U.S. App. D.C. 78, 986 F.2d 541, 543 (D.C. Cir. 1993)("The more important the witness to the government's case, the more important the

defendant's right, derived from the Confrontation Clause of the Sixth Amendment"); *United States v. Lynch*, 499 F.2d 1011, 1022 (D.C. Cir. 1974) (holding Confrontation Clause considerations "are especially cogent when the testimony of a witness is critical to the prosecution's case against the defendant."); *United States v. A&S Council Oil Co.*, 947 F.2d 1128, 1133 (4th Cir. 1991) ("Where [a case] involves the government's most crucial witness, the [Confrontation Clause] concerns are especially heightened."); *United States v. Quinn*, 901 F.2d 522, 529 (6th Cir. 1990).

Ultimately, it is the military judge who must sift through the facts, apply the law, and make the determination. In doing so, he or she is faced with a daunting task. The military judge must carefully weigh all facts and circumstances of the case, keeping in mind the preference for live testimony. Factors to be considered include the importance of the testimony, the amount of delay necessary to obtain the in-court testimony, the trustworthiness of the alternative to live testimony, the nature and extent of earlier cross-examination, the prompt administration of justice, and any special circumstances militating for or against delay. *Cokeley*, 22 M.J. at 229. Also, in making such a determination, the military judge must ensure that the information supporting the unavailability is neither "sparse" nor "stale." *United States v. Vanderwier*, 25 M.J. 263, 267 (C.M.A. 1987).

But it is important to remember that the consideration of these factors is not a balancing test,

for the proponent bears the burden of demonstrating unavailability in the face of the strong preference for live testimony. *Cokeley*, 22 M.J. at 228 (citing *Inadi*, *Roberts*, and *United States v. Crockett*, 21 M.J. 423 (C.M.A. 1986)).

In *Cokeley*, our superior court addressed a similar fact pattern involving the admission into evidence of a deposition of a key Government witness in place of the live testimony of the witness at trial. In finding an abuse of discretion in the determination of unavailability at trial, the court stated that the military judge "did not articulate that he weighed the relevant considerations." *Cokeley*, 22 M.J. at 229. The court also noted that the testimony of the witness was more than "merely cumulative or of a minor nature but was absolutely necessary to prove that a crime had been committed and to describe the assailant." *Id.*

Additionally, the need to consider the witness' infirmity at the time of trial has been found to be a critical factor in unavailability determinations. *Id.* at 230; *Burns*, 798 F.2d at 936-937; *Jones v. Nabisco, Inc.*, 95 F.R.D. 25, 26 (E.D. Tenn. 1982). This is buttressed by the language of MIL. R. EVID. 804(a)(4) that the witness is unable to be present "because of death or *then existing* physical or mental illness or infirmity...." (emphasis added). In *Burns*, for example, the trial court found a witness was unavailable based on a physician's testimony at a hearing held two months after the last contact with the witness. The appellate court found that the trial court erred in basing its ruling on stale information,

and by requiring the defendant to show that the witness was available. The *Burns* court stressed that the government was required to make "stringent efforts to show that [the witness] was unavailable." *Id.* at 942.

Applying the foregoing to the facts of this case, we conclude that the military judge erred in finding TO unavailable based solely on the evidence presented by the Government. The deposition was the critical piece of evidence directly identifying the appellant as the person with whom TO was engaged in sexual intercourse on the evening in question. In short, the verdict rested almost completely on TO's deposed testimony. As such, her unavailability required greater scrutiny.

We do not quibble with the qualifications of Dr. B, or her diagnosis that TO was suffering from a serious mental illness in December 2001 that would likely demand years of medication and therapy to control. We note, however, that Dr. B admitted that it was possible, but doubtful, that TO had improved dramatically enough over the 44 days since she had last seen her to be able to testify at trial. Record at 192. While Dr. B's strong opinion was that such a rapid recovery would not have occurred, it would have been a relatively simple process for the Government to have updated Dr. B's prognosis with a statement from the treating therapist or to have had Dr. B contact TO to update her prognosis personally. Despite Dr. B's opinion, based on considerable medical acumen and reliable statistics, we are not persuaded on the basis of the record

before us that, on the date of trial, TO was unavailable to testify.

Also, the tone and tenor of Dr. B's testimony reveals her zealous advocacy on behalf of TO, an admirable quality to be expected from a treating physician. To eliminate the possibility of any natural bias, however, resulting from the doctor-patient relationship, an independent medical opinion from a court-appointed doctor would have been of great benefit to the military judge in this case. *See Warren v. United States*, 436 A.2d 821, 829 (D.C. 1981).

The Government presented no statement from TO regarding her fear of testifying, nor was there any statement from TO's mother, who was, apparently, available as a witness on the motion if the Government had called her.[2] Such testimony would have gone a long way toward answering any question as to whether the court was dealing with an otherwise cooperative witness who could not testify because of her mental condition or an uncooperative witness shielding herself from the uncomfortable duty of testifying by wrapping herself in her admittedly serious mental infirmity. While these are difficult questions to ask of a child witness, they are, in our minds, absolutely necessary for the Government to show that it has put forth its best

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[2] The dissent states in part that TO's mother's input "was already clearly on the record." We are only able to find one reference by the trial counsel to TO's mother asking that they not telephone the house any more because TO is afraid it is about travel arrangements to the trial. Record at 147.

efforts to secure the appellant's right to confrontation.

Additionally, the Government did not pursue another avenue potentially available to satisfy the appellant's right to confrontation. Although the issue of remote live testimony was broached by civilian trial defense counsel during argument on the motion and cross-examination of Dr. B, the military judge did not reference R.C.M. 914A, MIL. R. EVID. 611(d), or *Maryland v. Craig*, 497 U.S. 836 (1990). Nor did he make any specific findings regarding the availability of alternate forms of live testimony in lieu of accepting the videotaped deposition into evidence. In *Craig*, the Supreme Court addressed the use of remote closed-circuit television to allow a child victim in a sexual abuse case to testify contemporaneously during the trial, be subject to cross-examination, be observed by the accused and the trier of fact, but to not have to experience the trauma of appearing in the courtroom itself, full of court personnel, spectators, and the person who allegedly abused her.

In considering the right of confrontation, the Court in *Craig* stated that it had never held that the Confrontation Clause "guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." *Craig*, 497 U.S. at 844. The Court went on to emphasize that this right guarantees that each witness provides testimony under oath, thus impressing upon them the "seriousness of the matter" and preventing false statements because of

the potential for a perjury conviction; forcing each witness to submit to cross-examination, "the 'greatest legal engine ever invented for the discovery of truth'"; and permitting the trier of fact to "observe the demeanor of the witness" and thus assess credibility. *Id.* at 845-46 (quoting *California v. Green*, 399 U.S. 149, 158 (1970).

In recognizing that there is a compelling interest in protecting minor victims of sexual abuse from further trauma and embarrassment, the Court concluded that the "interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Id.* at 853. This mode of presentation of evidence is specifically recognized in military practice in R.C.M. 914A and MIL. R. EVID. 611(d). Military judges are authorized to allow child victims of sexual abuse to utilize remote live testimony where the child is unable to testify because, among other reasons, the child witness "suffers from a mental or other infirmity." MIL. R. EVID. 611(d). The military judge should have demanded that the Government fully explore this reasonable and available option for live testimony before admitting the deposition into evidence.

We view the determination of unavailability of a witness at trial as a prerequisite to introducing alternative forms of evidence such as depositions as requiring more than the moving party demonstrating the existence of an obstacle, even a compelling one, to the production of the live witness

at trial. The moving party's burden must include adequate efforts to overcome that obstacle, such as a showing that invitational travel orders have been issued to a witness outside the effective range of service of process. Similarly, in the case before us, much was left unknown or undone by the moving party in establishing that the obstacles preventing TO from testifying at trial could not have been overcome.

We do not, as the dissent would contend, require the Government to "do everything humanly possible" to produce a live witness at trial. We simply demand what the law compels -- that all reasonable means of obtaining a key witnesses' presence be considered before allowing the use of a substitute for live, in-court testimony. *Barror*, 23 M.J. at 373. In this case, the Government did not "exhaust every means to secure the preferred live testimony before utilizing an out-of-court declaration." *Hines*, 23 M.J. at 133.

The dissent refers to the evidence presented by the Government on the issue of unavailability as "unrebutted" and not refuted. There is no burden on the appellant to present evidence of any kind on this issue. The burden is wholly on the Government as the proponent of the deposition. *Cokeley*, 22 M.J. at 229. The dissent's reliance on *United States v. Cordero*, 22 M.J. 216, 221 (C.M.A. 1986) to support the proposition that the defense has a burden to rebut the Government's evidence is misplaced. In *Cordero*, the Government had demonstrated the witness's unavailability by showing that the witness

had disregarded the subpoena issued to her and had fled the country without providing any information as to her whereabouts. *Id.* In that case, the Government had unequivocally demonstrated unavailability of the witness at the time of trial and there were no readily apparent alternative methods of producing her for trial. The court in *Cordero* was simply stating the obvious, that, once unavailability is firmly established, the only way to overcome that determination is for the appellant to demonstrate that the witness could be produced. In the present case, the Government failed to provide a sufficient showing of unavailability and there was much more that the Government could have done in an effort to produce TO.

Our decision in this case is fact-specific. The record before the court does not contain sufficient evidence of Government efforts to obtain the witness at the time of trial to overcome the heavy burden demanded by the appellant's right to confrontation. Accordingly, we conclude that the record before us is not sufficient to meet the Government's burden to show that TO was unavailable to testify at the time of trial, we further conclude that the military judge abused his discretion in admitting the videotaped deposition based on the facts before him.

4. Prejudice

In addition to the videotaped deposition of TO, the Government evidence against the appellant included two witnesses who testified that the appellant was aware of TO's age at the time of the

alleged offenses. The Government also presented the testimony of Private M that he had walked in and saw TO on top of, and appearing to be having sexual intercourse with, a "black person" and that the appellant was the only "colored person" at his residence at the time. Record at 292-93. The Government played the videotaped deposition of TO to the members and the appellant, through counsel, requested that the cross-examination portion of the deposition not be played.

Where an error of constitutional dimension is involved, this court may only affirm if the error is found to be "harmless beyond a reasonable doubt." *United States v. Simmons*, 59 M.J. 485, 489 (C.A.A.F. 2004)(quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). The court in *Simmons* also defined the harmless error inquiry under the *Chapman* analysis as whether it is "'beyond a reasonable doubt that the error complained of did not contribute to the verdicts obtained.'" *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 15 (1999)).

In *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991), the Court made it clear that the Government has the burden of establishing that an error did not contribute to the conviction. In that case, the Court found that, without the confessions, it was "unlikely that Fulminante would have been prosecuted at all, because the physical evidence from the scene and other circumstantial evidence would have been insufficient to convict." *Id.* at 297. The Court also found that the confessions influenced the sentencing phase of the trial. *Id.* at 301.

Our superior court has described its focus in applying the *Chapman* harmless error analysis as "whether the error had or reasonably may have had an effect upon the members' findings." *United States v. Bins*, 43 M.J. 79, 86 (C.A.A.F. 1995). We cannot affirm findings in a case involving constitutional error "unless we determine beyond a reasonable doubt that the error did not contribute to the findings of guilty." *United States v. Hall*, 58 M.J. 90, 94 (C.A.A.F. 2003).

The videotaped deposition was the central and most critical piece of evidence introduced against the appellant at trial. We have no doubt that the appellant's findings of guilty were predicated in large part on the deposition. Without this evidence, we are not convinced that the appellant would have been convicted of either offense. The dissent's discussion of the sufficiency of the evidence bears no relevance on this point.

Conclusion

Accordingly, the findings and sentence are set aside. The record of trial is returned to the Judge Advocate General of the Navy. A rehearing may be ordered.

Judge STONE concurs.

ROLPH, Chief Judge (Dissenting):

Having carefully considered the briefs of appellate counsel, and the arguments, analysis, and case

citations set forth in the majority opinion, I must very respectfully dissent. Upon thorough review of the appellant's record of trial, I do not believe that the military judge presiding over this contested general court-martial abused his discretion when he admitted into evidence the deposition testimony of TO -- the twelve-year-old victim -- over the objection of the defense.

Standard of Review

A military judge's ruling on the admission of evidence, and on the determination of witness unavailability for purposes of both the confrontation clause of the Sixth Amendment to the Constitution and MILITARY RULE OF EVIDENCE 804(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), should not be overturned on appeal absent a clear abuse of discretion. *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997)(quoting *United States v. Redmond*, 21 M.J. 319, 326 (C.M.A. 1986)); *United States v. Cokeley*, 22 M.J. 225, 229 (C.M.A. 1986). Under this exacting standard of review, the military judge's decision must not be reversed unless it was "'arbitrary, fanciful, clearly unreasonable," or "clearly erroneous.'" *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)(quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987). Only when the military judge's findings of fact are clearly erroneous or his conclusions of law are patently incorrect will his considerable discretion have been abused. *United States v. Humphreys*, 57 M.J. 83, 90 (C.A.A.F. 2002); *United States v. Kelley*, 45 M.J. 275, 279-80 (C.A.A.F 1996). If reasonable judicial

minds could logically differ as to the propriety of the judicial determination made, then no abuse of discretion has occurred. *United States v. Glenn*, 473 F.2d 191, 196 (D.C. Cir. 1972). *Accord United States v. Travers*, 25 M.J. 61, 62-63 (C.M.A. 1987). We review *de novo* the mixed question of law and fact presented in determining the ultimate issue of unavailability for purposes of the Confrontation Clause. *McCandless v. Vaughn*, 172 F.3d 255, 265 (3d Cir. 1999); *Martinez v. Sullivan*, 881 F.2d 921, 926 (10th Cir. 1989); *Burns v. Clusen*, 798 F.2d 931, 941-42 (7th Cir. 1986).

Confrontation and the Admission of Deposition Testimony

In the landmark case of *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court set forth exacting standards aimed at guaranteeing an accused's Sixth Amendment right ". . . to be confronted with the witnesses against him . . . ." U.S. CONST. AMEND. VI. Before "testimonial" witness statements may be admitted into evidence against an accused, the Confrontation Clause requires that the witness who made the statement be unavailable, and that the accused have been afforded a prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 53-54; *see also Idaho v. Wright*, 497 U.S. 805 (1990); *Ohio v. Roberts*, 448 U.S. 56 (1980).

Under MIL. R. EVID. 804(a), "unavailability of a witness" is also required prior to admission of former testimony -- including testimony by deposition -- and includes situations in which the declarant "is unable

to . . . testify at the hearing because of death or *then existing physical or mental illness or infirmity.*" (emphasis added). *See* Art. 49, Uniform Code of Military Justice, 10 U.S.C. § 849. When former testimony is offered as an exception to the hearsay rule, the proponent bears the burden of clearly establishing the unavailability of the absent witness. *United States v. Hubbard*, 28 M.J. 27, 31 (C.M.A. 1989). Former deposition testimony of a witness may be admitted against an accused at trial in the same or another proceeding under MIL. R. EVID. 804(b)(1), if it was taken in compliance with law, and "if the party against whom the testimony is . . . offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

It is undisputed that the videotaped deposition testimony of TO was taken "in compliance with law," *see* R.C.M. 702, was "testimonial" in nature, and bore "adequate indicia of reliability," *see Roberts*, 448 U.S. at 66. It is also undisputed that the deposition of TO afforded the appellant a personal examination of TO in his physical presence, was taken under oath, subjected TO to cross-examination, and, because it was videotaped, afforded the members the opportunity to observe TO's demeanor. *California v. Green*, 399 U.S. 149, 158 (1970). Procedurally, it is important to note that TO's deposition was taken after the Article 32, UCMJ, investigation was completed, post-referral of charges, and after a specific defense request for face-to-face confrontation of TO. Upon order of the military judge, the Article 32, UCMJ, Investigating

Officer and the Convening Authority subsequently considered the deposition testimony in relation to their original recommendation and decision, respectively, to refer the charges against the appellant to a general court-martial.[3] The following chronology of events is germane to the issues raised by this assignment of error:

Chronology

03 Jul 2001	Charges against appellant referred to GCM.
12 Jul 2001	Appellant arraigned.
30 Oct 2001	Defense raises motion to compel new Article 32, UCMJ, investigation to confront TO.
31 Oct 2001	Military judge denies motion for new Article 32, UCMJ, investigation but

[3] In ordering the taking of TO's deposition, the military judge directed that the Government provide a copy of the deposition to the Article 32, UCMJ, Investigating Officer for his "consideration and comment." He also ordered that an addendum to the Article 34, UCMJ, advice letter be prepared by the staff judge advocate to advise the convening authority of the deposition and allowing for that authority to determine "the impact of the deposition on his decision to refer the charges . . . to a general court-martial." *See* Appellate Exhibit LXIV at 2. Finally, the military judge required the convening authority to execute a referral memorandum indicating what impact, if any, TO's deposition and the subsequent Article 34, UCMJ, advice letter addendum had upon his decision to refer the appellant's case to a general court-martial. Appellate Exhibit XXIII; Record at 65-66.

	orders deposition of TO.
13 Nov 2001	Deposition of TO conducted.
04 Dec 2001	TO hospitalized for mental deterioration.
07 Dec 2001	Government notified of TO's hospitalization.
10 Dec 2001	TO discharged from hospital. [Originally scheduled date for commencement of trial].
11 Dec 2001	Defense litigates Motion *in Limine* to exclude deposition testimony of TO.
07 Jan 2001	Military judge orders testimony of treating psychologist (Dr. Bock) and production of her *curriculum vitae* to resolve Motion *in Limine*.
22 Jan 2006	Dr. Bock testifies on Motion *in Limine*. Appellate Exhibits XXXI, XXXII, XL, XLI admitted on the Motion.
23 Jan 2006	Military Judge denies Motion *in limine* and admits into evidence TO's deposition testimony.
23-25 Jan 2006	Trial on the merits.

Discussion

a. Opportunity and Similar Motive to Develop the Testimony.

On 30 October 2001, the appellant, through his counsel, raised a motion at an Article 39(a), UCMJ, session to compel a new Article 32, UCMJ, investigation based on the fact that the defense team had not had the opportunity to interview TO, and that she was not present at the original Article 32, UCMJ, pretrial investigation. Claiming that "the defense ha[d] been refused the ability to cross-examine the victim in this case on the record as required by case law," Record at 23, the appellant's counsel went on to elaborate extensively on why a new Article 32 investigation should be ordered. Among the reasons offered were the following:

1) The convening authority, in deciding whether or not to refer the charges to trial, should have the benefit of the testimony and cross-examination of the alleged victim, TO. Record at 23.
2) The testimony of TO, once obtained, should be considered by the Article 32, UCMJ, Investigating Officer to determine whether his recommendation to refer charges to a general court-martial would remain the same. Record at 24.
3) An interview of TO alone would be inadequate, as it would not allow for adequate impeachment if inconsistencies were developed. Record at 25.

Arguing further on the motion, defense counsel asserted to the military judge that, cross-examination of TO "is what we are really looking for here, to get her on the record and ask her those hard questions and get them on the record as required by case law." Record at 25. The military judge denied the defense request for a new Article 32 investigation, but ordered a deposition of TO based upon these stated motivations of the defense team.

The deposition of TO was subsequently conducted in the presence of the appellant and his counsel, and presided over by a properly appointed Deposition Officer. TO's deposition testimony was taken under oath and recorded completely on videotape (and fully transcribed verbatim in writing) allowing the finder of fact to fully evaluate her appearance and demeanor during trial on the merits. *See* Prosecution Exhibit 3 and Appellate Exhibit XXXII. During the deposition, the Appellant's defense team had an unrestricted face-to-face opportunity to cross-examine TO regarding the allegations against the appellant arising from their sexual relationship, and took advantage of it. *See United States v. Connor*, 27 M.J. 378, 389 (C.M.A. 1989). Unlike a preliminary hearing where defense counsel may reasonably claim lack of motive to cross-examine a prosecution witness (or examine at all), this post-referral deposition was conducted in full contemplation of this already referred general court-martial. The defense team was clearly aware of all the relevant issues and possessed the same motive and opportunity for cross-examination they would have had if TO had testified in person at trial. *See*

United States v. Crockett, 21 M.J. 423, 426 (C.M.A. 1986). The original arguments made to the military judge in support of their motion for a new Article 32 investigation make it clear the defense team knew exactly what the issues were, what was at stake in this case, and what they were after through face-to-face cross-examination of TO under oath. According to the defense team's stated position on the record, this deposition would impact the very foundation of all original decisions leading to referral of the charges against their client to a general court-martial. Based upon these facts, and a thorough review of the deposition testimony, no straight-faced argument can now be asserted that the appellant and his counsel lacked a similar motive and opportunity to develop the testimony of TO through cross-examination.[4] *Id.*

b. Unavailability of TO

On 04 December 2001, just six days before this trial was originally scheduled to commence, TO was admitted to the Spirit of St. Louis Hospital in St. Charles, Missouri, for inpatient psychiatric evaluation and treatment. AE XXXI. In a letter dated 07 December 2001, TO's attending psychologist notified the prosecution team that:

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[4] Defense counsel, in seeking at trial to exclude the deposition of TO he requested, disingenuously claimed that the deposition of TO was simply an opportunity to "interview" her, and that "it was not the defense's goal to cross-examine her as if we were at trial." Record at 94. This, of course was completely contrary to the argument he made in originally requesting the new Article 32 investigation to the effect that a mere "interview" of TO would be an inadequate remedy as it would not properly preserve possible "impeachment evidence." Record at 25.

> "[TO] was admitted . . . because of severe danger to herself. She has initiated psychiatric treatment for her presumed mood disorder. She is being treated with medications. She is having significant psychiatric problems as well as medication adjustment reactions. She cannot attend court on any date before the end of December. She remains hospitalized at this time. The date of her discharge is not yet known."

AE XXXII. Upon her admission, it was noted that TO (now 13 years old and in the eighth grade) was experiencing her first psychiatric hospitalization, and that she had previously been treated as an outpatient for depression and suicidal ideation. Record at 174; AE XLI at 9. Her hospitalization was ordered after her outpatient therapist and the hospital assessment staff noted a serious deterioration in her mental status and became alarmed by her suicidal attempts and gestures. *Id.* During her admitting psychiatric evaluation, the following was recorded:

> ". . . . Recently, patient had to give a deposition '*then it all got really worse.*' (sic) Patient has had numerous self-harm events such as putting a plastic bag over her head and cutting her hand with a knife '*I never told anyone.*' (sic) Patient has been in outpatient counseling. Her counselor recently was concerned about patient's

> worsening of status and recommended psychiatric assessment. At assessment, the patient could not contract for safety and felt preoccupied by her thoughts of killing herself. There was also, in the past week, an incident on the school bus, where patient was called various sexual slur names and a coke (sic) bottle was thrown at her. Patient had cut her wrist in the past week."

AE XLI at 9 (quotes and italics in original). Other symptoms clearly documented at the time included diminished sleep, decreased attention and concentration due to internal distraction, intermittent racing thoughts, wide mood swings (including crying spells and irritable temper), and panic attacks. *Id.* After six days of inpatient treatment, TO's discharge summary (dated 10 December 2001) reflected that she continued to be "solemn and disinterested with defeated, sad demeanor" and also felt "beleaguered by hopelessness and wished to die." *Id.* at 4. Dr. Bock, who had been attending TO throughout her hospitalization, documented her formal diagnosis that TO was suffering from, among other things, "Bipolar II Disorder, Rapid Cycling, Panic Disorder" and "Post-Traumatic Stress Disorder," both AXIS I disorders under the AMERICAN PSYCHIATRIC ASSOCIATION'S DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994)(hereinafter DSM-IV). *Id.*

This evidence was considered by the military

judge in support of the Government's position that TO was unavailable as a witness. Not wholly satisfied with the information contained within TO's medical records, and concerned about the accused' right to confrontation of this critical Government witness, the military judge ordered the production of Linda P. Bock, M.D., a board-certified child psychologist and TO's attending physician while hospitalized from 04 to 10 December 2005, as a witness on the motion. Record at 157, 169-70, and 173-74; AE XL. On 22 January 2002, another Article 39(a), UCMJ, session was conducted by the military judge to adduce additional testimony and evidence relating to TO's medical and psychiatric condition. At this hearing, the judge received the sworn testimony of Dr. Bock, and additionally received into evidence her *curriculum vitae* and eighty-eight pages of medical and psychiatric treatment records relating to TO's hospitalization. AE XL and XLI. Dr. Bock's credentials and expertise as a board-certified child psychiatrist and analyst practicing since 1980 were well-established and undisputed.[5] Record at 173-74.

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[5] Dr. Bock's impressive *curriculum vitae* reflects an internship in pediatrics (1974-1975); a residency in pediatrics (1975-1976); a residency in psychiatry (1976-1978); and a fellowship in child and adolescent psychiatry (1978-1980). She was engaged in a full or part-time private adolescent psychiatry practice from 1980 to the time of trial. She served in numerous consulting and teaching positions relating to her profession, published extensively in her field, and was a member and/or director of multiple professional organizations related to the treatment of psychiatric disorders.

Dr. Bock reiterated on the stand the diagnosis she previously documented in TO's medical records. She went on to carefully explain that "Bipolar II Disorder, Rapid Cycling, Panic Disorder"[6] and "Post-Traumatic Stress Disorder" (PTSD)[7] are both serious AXIS I mental disorders, and that TO clearly met the criteria for each as set forth in the DSM-IV. Record at 175-80. Dr. Bock testified that TO's mental condition deteriorated significantly after her 13 November 2001 deposition, and that she required anti-psychotic and anti-depressant medications to deal with her disorders. *Id.* at 176-78. TO had a suicidal "episode" in August 2001 for which she was prescribed anti-depressants, followed by a second

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[6] Bipolar II Disorder is characterized by the occurrence of one or more "Major Depressive Episodes" accompanied by at least one "Hypomanic Episode." DSM-IV at 359. "Completed suicide (usually during Major Depressive Episodes) is a significant risk, occurring in 10%-15% of persons with Bipolar II Disorder." *Id.* at 360. This disorder is often, as in this case, associated with "Panic Disorder," which involves a discrete period of intense fear or discomfort that "has a sudden onset and builds to a peak rapidly (usually in 10 minutes or less) and is often accompanied by an imminent sense of danger or impending doom and an urge to escape." *Id.* at 359 and 394-95. When the "Rapid-Cycling" specifier has been included in a Bipolar Disorder diagnosis, it indicates the occurrence of four or more mood episodes during the previous 12 months. *Id.* at 390.

[7] PTSD involves the development of characteristic symptoms following an extreme traumatic stressor, which may include persistent re-experiencing of the traumatic event, persistent avoidance of stimuli associated with the trauma, and numbing of general responsiveness. The full symptom picture must be available for more than 1 month, and the disturbance must cause clinically significant distress or impairment in social, occupational, or other areas of functioning. *Id.* at 424.

"suicide gesture" after her deposition testimony was given. *Id.* at 178. While hospitalized, Dr. Bock described TO as:

> ". . . agitated, irritable. She was very unstable in mood. At times she would be [a] little bit tearful and weepy; and other times she would be bossy and pushy. She couldn't sit still. She was constantly fidgeting, very uncomfortable . . . ['Ilet's go, get me out of here['I. She was clearly very uncomfortable."

Id. at 181. TO also experienced a panic episode during which she believed that there were men outside her window at the hospital trying to get into her room to rape her. *Id.* at 180. Dr. Bock, after considering all of TO's demonstrated psychological abnormalities before and during hospitalization, concluded that it would be detrimental for her to testify as a witness at appellant's trial. Record at 180.

In the majority opinion above, Dr. Bock's conclusions concerning the detrimental impact upon TO of testifying at trial were challenged as "inadequate" for having been based upon dated or "stale" information. Because Dr. Bock had not personally examined TO between 10 December 2001 (the date of TO's discharge from the hospital) and 22 January 2002 (the date she testified on the Motion) – a period of approximately 43 days – the majority concludes that the military judge abused his discretion in ruling that she was unavailable.

Clinging to a single response given by Dr. Bock on cross-examination to the effect that TO's condition could "possibly" have improved since 10 December 2001, the majority ignores the reality of the whole of this board-certified psychiatrist's testimony. Also, the question posed on cross-examination simply asked whether it was "[p]ossible that [TO's] in a better state than when you discharged her?" Record at 192. It did not ask whether it was "possible" that testifying at trial would not be detrimental to TO's diagnosed psychiatric disorder and clearly guarded condition. The whole of Dr. Bock's testimony on this matter is instructive:

[Cross-examination by defense counsel of Dr. Bock]

Q. What was her prognosis when you released [TO from hospitalization]?
A. Guarded.

Q. What does that mean?
A. She has a serious chronic psychiatric disorder. Many individuals who have young or early onset bipolar disorder have the worse (sic) prognosis as opposed to an individual whose bipolar disorder doesn't become symptomatic until they are 25 or 30. Someone who is symptomatic at five, six is much worse off. So she is still very early onset (sic) so her prognosis is

guarded.

Q. Possible [sic] that she's in a better state than when you discharged her?
A. Pardon?

Q. Is it possible –
A. Currently?

Q. Yes. Is it possible?
A. All things are possible.

Q. Well, you gave –
A. I would find it doubtful, but it is possible.

Q. Well, you gave her medication and ordered her return to school?
A. Statistically, mood stability for bipolar disorder requires six to twelve months before you can expect to be at what you call baseline. So it is a very long recovery period. I usually counsel the social workers to advise the parents to expect that it's going to be a very rocky road and that she may need rehospitalization.

Record at 192.

The entire testimony of Dr. Bock, along with the evidence presented on this motion, demonstrates very persuasively that TO was currently suffering

from a serious psychiatric disorder that required long-term treatment and medication. This board-certified psychiatrist with over twenty years of experience made it clear that TO was newly diagnosed, that treatment and drug therapy[8] had been newly initiated, and that "she is in pretty severe discontrol currently." Record at 205. Dr. Bock told the military judge that TO's illness was ongoing, required protracted treatment, and opined that "if she's called in to testify as a witness in these proceedings that that will cause even greater trauma for her."[9] Record at 207. Dr. Bock's responses to questions from the military judge were unequivocal on this point:

[Questions by Military Judge]:

Q. Dr. Bock, is it my understanding that the illness that [TO] is suffering from is an ongoing illness; is that correct?

A. Correct.

Q. And that her treatment is likely to be long term?

A. Protracted, yes, sir.

Q. And it is your opinion that if she's called in to testify in these proceedings that

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[8] TO was prescribed Seroquel, a brain protectant that blocks dopamine and anti-psychotic medication, and Tegretor, which was a mood stabilizer. AE LXIV at 3; Record at 175-76.

[9] It is instructive that Dr. Bock's original admission diagnosis indicating that TO might be able to testify "by the end of December" completely changed after consideration of her full medical history, present symptoms, and ultimate diagnosis.

that will cause even greater trauma for her?

A. Yes, sir.

Q. Now, when we speak in terms of trauma and traumatizing for the child, it is my understanding from what you are saying that this is more than a diminimous (sic) emotional stress placed on the child?

A. Yes, I think a more helpful term to use is stimulating. Because if you use trauma, it gets confused with PTSD; and when someone has bipolar disorder, it is very difficult for them to tolerate much stimulation. They have to calibrate how much stimulation they are going to get in their life so it doesn't overwhelm and over stimulate the brain cells. The medicines are meant to kind of destimulate as it were to protect the brain from over stimulation . . . .

Q. But as it relates to [TO], again, if she testifies we are talking about her suffering more than minor emotional distress?

A. Yes. I am – yes, sir I think it would be a major, over stimulating event that could be predictably associated with either a repeat suicide attempt or a repeat psychiatric hospitalization.

Record at 207-08.

Dr. Bock's testimony was unequivocal and unrebutted. In light of the specific nature and seriousness of TO's psychiatric diagnosis, it was also clearly reasonable that Dr. Bock would not feel the need to "update" her recommendation within a mere month-and-a-half of having rendered it. She testified clearly to this effect on the motion:

> " . . . . I can't think of any other data that would be pertinent to change my view . . . I just don't think it's good for her to have to take that level of stimulation. I just think it's too much for her, and I don't think it is going to change for a long while. You know[,] six to twelve months of medication and a longer period of time in therapy until she masters talking about traumas. She may never master talking about traumas."

Record at 209.

In my opinion, and on these facts, the military judge's findings of fact were not "clearly erroneous" and he did not abuse his discretion in admitting TO's deposition testimony. *See United States v. Donaldson*, 978 F.2d 381 (7th Cir. 1992)(holding district court's ruling that pregnant female was unavailable when she was admitted to hospital with serious illness on eve of trial was proper); *United States v. Amaya*, 533 F.2d 188, 191 (5th Cir. 1976)(concluding witness unavailable due to loss of memory, even where evidence did not establish loss

was permanent); *People v. Lombardi*, 332 N.Y.S.2d 749 (N.Y. 1972)(finding witness unavailable where evidence demonstrated her mental and physical health would be seriously jeopardized and could have resulted in further and perhaps successful attempt at suicide.); *Warren v. United States*, 436 A.2d 821 (D.C. 1981)(holding evidence of severe risk of psychological trauma to witness that could potentially flow from testifying at trial sufficient to sustain judge's determination that witness was unavailable). *People v. Gomez*, 103 Cal. Rptr. 80 (1972)(concluding witness was unavailable where there was a "strong possibility" that it would be detrimental to her psychological welfare to appear in court.)

The cases cited by the majority in support of their proposition that the military judge relied on "dated" information, and that he should have done more in making his "unavailability" determination, can clearly be distinguished from this case. *Cokely* clearly recognizes that "there is no bright-line rule which will fit every situation," and that "[u]navailability is clear when the witness is not expected to improve." 22 M.J. at 229 (*citing United States v. Keithan*, 751 F.2d 9 (1st Cir. 1984). *Cokeley* additionally acknowledges, "delay of the trial is not necessary in every case where a witness is ill but may recover someday." *Id.* (citing *Howard v. Sigler*, 454 F.2d 115 (8th Cir. 1972)). In *Cokeley*, the then Court of Military Appeals determined that the military judge abused his discretion in admitting over defense objection the deposition testimony of the alleged victim of Cokeley's attempted rape. The

alleged victim returned a subpoena to appear at trial with a note stating that she was unable to travel due to pregnancy. At the time of trial, counsel learned that the alleged victim had given birth by emergency Caesarean section, that complications had ensued with her and her child, and that her attending physician had opined that it would be "two to three weeks" before her ability to travel could be ascertained, and that further consultation with the attending pediatrician was required to ascertain exactly when she could travel. *Id.* at 226-27. Because the alleged victim's unavailability would have most likely been "merely temporary," it was held to be error to admit her deposition in lieu of her live presence at trial. *Id.* at 228. Additionally, the judge in *Cokeley* erroneously shifted the burden to the accused to demonstrate that the witness was available and necessary. *Id.* at 229. This case is clearly distinguishable in that, unlike pregnancy complications, TO's mental disorders were clearly not "merely temporary" afflictions, but rather long-term psychiatric maladies with no discernible date of resolution, and no indication as to when it would be non-detrimental for TO to testify. Delaying the proceedings was not a realistic remedy where Dr. Bock clearly indicated it would take "six to twelve" months for TO to arrive at a "baseline," and even then her ability to testify could not be guaranteed. Record at 192, 198, and 208-09. Dr. Bock was unequivocal in her estimate that "TO would require extensive therapy for an indefinite time, and that she would probably be unable to discuss the events involving the Appellant for five to twelve years. *Id.*

The military judge in this case appreciated that the burden to demonstrate unavailability rested with the Government (*see* Record at 157). He specifically and carefully considered and addressed virtually all of the factors the *Cokeley* decision listed as important in properly making this determination. AE LXIV; Record at 228-32. Unlike the situation in *Cokeley,* the military judge here clearly articulated the many factors he considered and weighed in arriving at his determination that TO was "unavailable." AE LXIV.

I also believe the majority is in error in asserting that the military judge improperly relied on "stale" information in making his decision. Again, the cases cited in the majority opinion are clearly distinguishable from this case. *Burns v. Clusen*, 798 F.2d 931 (7th Cir 1986), cited as dispositive on this issue by the majority, is different in critical respects:

First, *Burns* involved an adult witness. Here, we are dealing with a twelve-year-old child victim who was only thirteen at the time of trial.

Second, *Burns* involved a period of almost two months from when the diagnosing psychiatrist had last had personal contact with the alleged victim (4 Nov 1980) and the motion hearing on unavailability being conducted (18 October 1980). Following that period, the *Burns trial* was twice postponed for an additional period of approximately five months (i.e., a total of 7 months) before trial on the merits began, with no reassessment of the alleged victim's condition being made. *Id.* at 935-36, 939. That is

clearly not the situation here. A mere 43 days elapsed from the last date Dr. Bock had contact with TO (10 December 2001) to trial on the merits commencing (23 January 2002, the day after Dr. Bock testified and the determination of TO's unavailability was announced). Additionally, the psychiatrist in *Burns* had diagnosed a mental disorder ("schitzophreniform disorder") that had a clearly documented duration of less than six months, making it highly probable that the victim would have been capable of testifying at the time that trial actually began in that case. *Id* at 938. TO's disorder was not short-term in nature, and indeed may afflict her for many years or the rest of her life. Record at 207. Accordingly, Dr. Bock's information, diagnosis, opinions and prognosis were clearly not "stale."

Third, two presiding judges in the *Burns* case rendered inconsistent findings on the issue of "unavailability," making it difficult upon review to determine what actually served as the basis for the finding. The trial court in *Burns* further erred by refusing to reconsider its ruling because the defendant had not introduced expert testimony to show the witness had recovered, improperly shifting the burden to the accused to show "availability." The findings in this case by Judge Keller are clear, unambiguous, timely, and consistent with the evidence presented at trial. No burden shifting ever occurred during this trial. The infirmities throughout the *Burns* trial did not occur at this general court-martial.

Finally, *Burns* involved the admission of preliminary hearing testimony that was not recorded on videotape, thus depriving the fact-finder of the opportunity to assess the victim's demeanor. That is not the case here.

Similarly, the majority's reliance on *United States v. Vanderwier,* 25 M.J. 262 (C.M.A. 1987) is also misplaced. In that case, the "unavailable" witness (ship's executive officer) was deposed over defense objection, the military judge entered no essential findings of fact, and the witness was ruled "unavailable" for trial despite the fact that the trial ended just two-days before the witness' period of unavailability ended. *Id.* at 266-67. The abuse of discretion in *Vanderwier* bears no logical relationship to the diligence and effort exerted by Judge Keller to determine exactly what TO's status was as the trial dates closed in on the parties.

The majority faults the military judge for failing to obtain a "statement from TO regarding her fear of testifying," or "a statement from TO's mother." The logic of this appears faulty in the face of unavailability determinations based upon formal and properly diagnosed psychiatric disorders. TO's fear of testifying was but one symptom among many serving as the basis for the ultimate diagnosis of "Bipolar II disorder, Rapid Cycling, Panic Disorder" and "PTSD." The unrebutted mental health expert here was Dr. Bock. It was her well-considered psychiatric diagnosis based on years of medical and psychiatric experience that was critical to this particular determination. Obtaining a "statement"

from TO would have offered little to Dr. Bock's analysis (*see* Record at 209) or that of the court, and could have caused TO even more and greater trauma and symptoms than she was already suffering. To request TO to provide a statement in this manner simply to test her resistance to testifying "would have unnecessarily burdened the very person whose well-being the court sought to protect." *See Warren,* 436 A.2d at 830. Also, while asking TO's mother to provide a "statement" may have given the court additional information of interest, the mother's input in this case was already clear in the record, and surely would not have altered Dr. Bock's conclusion. *See* Record at 147, 229; AE XLVII.

Finally, the majority suggests that an "independent medical opinion from a court-appointed doctor" was suggested in this case to "eliminate the possibility of any natural bias . . . resulting from the doctor-patient relationship [between TO and Dr. Bock]." Admittedly, Dr. Bock was genuinely concerned for the welfare of her psychiatrically disturbed minor patient, as any properly trained health care professional would be when caring for someone suffering from multiple Axis I mental disorders. Dr. Bock's "advocacy" on behalf of TO was noteworthy more as a reflection of the seriousness of TO's mental condition than for its impact on relieving her from the obligation to testify at trial. The majority's recommendation for independent, court-appointed psychiatric expertise would make sense if there had been "dueling" expert witnesses testifying before the court on this issue, or if Judge Keller doubted the credentials, expertise, or

professional opinion of Dr. Bock. That was not the case here. Dr. Bock's testimony was persuasive and absolutely unchallenged by any other mental health professional. *See United States v. Cordero*, 22 M.J. 216, 221 (C.M.A. 1986). The majority's suggestion for the appointment of an independent court-expert in this case would have added tremendous expense and delay to the proceeding when absolutely no evidence rebutted Dr. Bock's diagnosis and opinions. Also, assuming an "independent" court-appointed doctor was designated to examine TO, how then should the trial judge deal with the "natural bias" flowing from that doctor-patient relationship? I believe that, as jurists, we tread on very thin ice when we counter fully qualified and unrebutted expert testimony with nothing more than unsupported argument and speculation.

The requirement of the law is not that the Government must do everything humanly possible to get a witness to testify, only that it make a reasonable, good faith effort to get the witness to court. *United States v. Reed*, 227 F.3d 763, 767 (7th Cir. 2000). "'[T]he lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness'." *Id.* (quoting *Roberts*, 448 U.S. at 74). Once TO's unavailability was demonstrated by the Government through the very persuasive testimony of Dr. Bock, the burden then rested upon the defense to refute this showing with more than mere speculation and supposition. *Cordero*, 22 M.J. at 221 (holding that once the Government demonstrated witness had disregarded subpoena and returned to her home in Germany, burden

shifted to defense to refute her unavailability). There is nothing in this record to suggest that the Government acted in bad faith or sought to create TO's unavailability at trial. The record is clear in reflecting the Government's good faith effort to obtain TO's presence at trial, including making travel arrangements and issuing her a subpoena to be present.

In light of TO's serious mental afflictions and the possible psychological harm that could have resulted from having her take the stand during trial on the merits, I believe the military judge was clearly within the realm of his considerable discretion in determining that TO was unavailable. The full and complete direct and cross-examination of TO at her earlier deposition -- in the presence of the accused, all counsel, and a qualified deposition officer -- ensured that the appellant's confrontation rights were secured to the maximum extent possible in this case. The fact that the defense team ultimately elected to withhold their cross-examination of TO from the members for tactical reasons cannot be held against either TO or the military judge.

c. Remote Live Testimony.

The majority additionally faults the military judge for not more thoroughly exploring and exhausting the various possibilities for alternative forms of live testimony that might have lessened or eliminated the trauma and/or impact of having TO testify in person. *See Maryland v. Craig*, 497 U.S.

836 (1990); R.C.M. 914A; MIL. R. EVID. 611(d). Once again, I respectfully disagree.

Requiring the exploration of "alternatives to live testimony" in light of the diagnosed psychiatric disorders in this case would seem the very antithesis of prudence. Dr. Bock's testimony was unequivocal that any participation by TO in the court-martial of the appellant could have a very serious and long-term impact on her ability to someday fully recover and go on to lead a normal life. This fully qualified expert, whose testimony on this issue was again unrebutted, made it clear that alternatives to live testimony by TO would not be adequate to prevent the trauma and potential suicide risk. The victim in this case is a young girl who at one point during her hospitalization was very close to "full mania" -- which Dr. Bock described as a form of psychosis. Record at 193. Dr. Bock was specifically asked on cross-examination whether alternatives to live testimony (e.g., being in another room) would alleviate the stress TO would suffer. Dr. Bock replied that, while remote testimony might help reduce the overall stress TO felt, it would be insufficient to be of any value to TO in light of her diagnosis. Record at 203.

If "alternatives to live testimony" are traditionally employed to alleviate trauma in individuals who enjoy complete mental health, would it make any sense to require that such be resorted to in cases where firmly diagnosed psychoses and preexisting trauma are manifest? *See Gomez*, 103 Cal. Rptr. At 82 (declaring that, in cases where

witness illness or infirmity is the cause of unavailability, it would be "an asinine bow to futility" to require "reasonable diligence" in attempting to secure the attendance of the witness). Judge Keller's case-specific findings concerning TO's unavailability represent a more than sufficient explanation of why remote live testimony (or similar measures) was not a reasonable option in this case.

d. Sufficiency of the Evidence.

Contrary to the assertions of appellant and his counsel, I believe the evidence in this case clearly established appellant's guilt beyond a reasonable doubt. TO's identification of the appellant at her deposition was unequivocal and was corroborated at trial (albeit reluctantly) by the testimony of the appellant's co-accused, Private First Class (PFC) McNamara. TO convincingly explained why she had not originally named the appellant as one of the many individuals she had engaged in sex with, and clearly affirmed afterwards the nature and extent her sexual relationship with the appellant. The asserted defense that TO had somehow "confused" the appellant with PFC Tapia (another "Latino" with whom she had engaged in sex) was weak and unpersuasive in light of TO's unambiguous testimony and the entire record of trial. The evidence in this case left little doubt regarding TO's positive identification of the appellant, and the members clearly agreed.

Also, I believe the majority is mistaken in their assertion that TO had communicated to the

hospital assessment staff that she had been "gang-raped" by "four to six Marine officers." In a long discussion on the record with Dr. Bock concerning the origins of these alleged statements, it became abundantly clear that these were not the words of TO, but imprecise words and terms selected by hospital personnel and recorded in her medical records. Record at 215-18. Dr. Bock made it clear that the term "rape" was sometimes used by hospital staff personnel in cases involving minors because, legally, they lack the ability to consent to sexual acts. *Id.* and at 210-14. Also, Dr. Bock explained that she and the hospital staff had no understanding of military ranks, and they simply chose the wrong words to use to describe such. Importantly, Dr. Bock made it clear that the records were not quoting verbatim what TO had told them, and that those were their words, not TO's. *Id.* TO had no apparent motive to fabricate her allegations against the appellant. She never alleged that her sexual relationship with him was anything but consensual, and it was clear from the entire record that she had an amicable relationship with the appellant. The evidence of appellant's guilt was more than sufficient.

e. Conclusion.

Because I am satisfied that the military judge did not abuse his discretion in ruling that TO was unavailable as a witness, or in admitting into evidence her deposition testimony, I would affirm the findings of guilty and the sentence in this case.

For the Court

R.H. TROIDL
Clerk of Court

Appendix E

UNITED STATES CONSTITUTION

Amendment VI – Right to Speedy Trial, Confrontation of Witnesses.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of

the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.